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No. ———

In The

Supreme Court of the United States

October Term, 1988

JAMES G. P. COLLINS,

Petitioner,

v.

ASSOCIATED PATHOLOGISTS, LTD., ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Seventh Circuit misapplied the standards for summary judgment set forth by this Court in *Matsushita Electric Industrial Co. v. Zenith Radio Corp,* 475 U.S. 574 (1986), in concluding that a court can make a "qualitative" and "quantitative" review of a claim which disregards material evidence and unrebutted expert testimony.

2. Whether the United States Court of Appeals for the Seventh Circuit misapplied the standards for determining the relevant market set forth by this Court in *Jefferson Parish Hospital Dist. No. 2 v. Hyde,* 466 U.S. 2 (1984), in concluding that, in a pathologist's challenge under the antitrust laws of an exclusive contract for pathological services, the relevant market is the national market in which pathologists compete for positions.

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ASSOCIATED PATHOLOGISTS, LTD., ET AL.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Dr. James G. P. Collins, ("Dr. Collins") through his counsel, petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Central District Court of Illinois' order of summery judgment is reported at 676 F.Supp. 1388 (C.D. Ill. 1987) (App. *infra* 19-67). The Seventh Circuit Court of Appeals' opinion affirming this order of summary judgment is reported at 844 F.2d 473 (7th Cir. 1988) (App. *infra* 1-18).

JURISDICTION

The opinion of the Seventh Circuit Court of Appeals was rendered on April 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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STATUTES INVOLVED

15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Ill. Rev. Stat. ch. 38 § 60-3 (2-4):

> Every person shall be deemed to have committed a violation of this Act who shall:

(2) By contract, combination, or conspiracy with one or more other persons unreasonably restrain trade or commerce; or

(3) Establish, maintain, use, or attempt to acquire monopoly power over any substantial part of trade or commerce of this State for the purpose of excluding competition or of controlling, fixing, or maintaining prices in such trade or commerce; or

(4) Lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, or services (including master antenna television service), whether patented or unpatented, for use, consumption, enjoyment, or resale, or fix a price charged thereof, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodity or service (including cable television service or cable television relay service), of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for such sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. . . .

STATEMENT OF CASE

(1) In 1984, upon his termination as an anatomical pathologist by Respondent Associate Pathologists Limited ("APL"), a group of pathologists under exclusive contract to provide pathological services at Respondent St. John's Hospital in Springfield, Illinois (the "Hospital"), Dr. Collins filed suit in the United States District Court for Central Illinois, raising federal and pendent state claims. Dr. Collins raised claims under the Sherman Act,

15 U.S.C. §§ 1, 2, for illegal tying, exclusive dealing in unreasonable restraint of trade, group boycott, monopolization and attempted monopolization. He also raised claims under the Illinois Antitrust Act, Ill. Rev. Stat. ch. 38, § 60-3(2-4) and under the Illinois common law for deprivation of staff privileges without due process, tortious inducement of that deprivation by APL, and breach of contract. The complaint included a jury demand. Jurisdiction in the district court was based on 28 U.S.C. § 1337.

(2) Dr. Collins' claim rested on the following facts: From 1975 to January 31, 1982, he had full, active staff privileges in anatomical pathology at the Hospital, the largest hospital in the Springfield Standard Metropolitan Statistical Area (the "SMSA"), controlling over 50% of the market for hospital services. During his association with the Hospital, Dr. Collins was also an employee and shareholder of APL, which since 1969, had had a contract with the Hospital to provide and did provide complete pathological services, including anatomical pathology (the "Contract").

(3) Although there was no question of Dr. Collins' professional competence, on January 31, 1982, APL terminated him. As a result of APL's exclusive contract with the Hospital, Dr. Collins, therefore, lost his ability to practice anatomical pathology at the Hospital. Unrefuted expert testimony attested that this constituted a reduction of Dr. Collins' staff privileges.* Contrary to the Hospital's bylaws, he received no notice, hearing or right to appeal. After his termination by APL, Collins was unable to obtain another position in Springfield and was no longer able

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*Pursuant to F.R.C.P. 56(e), Dr. Collins submitted sworn affidavits from experts in support of his claims. Respondents offered no expert support for their position.

to service patients in the SMSA. He ultimately accepted a lower paying job in California.

(4) Uncontroverted expert testimony established that the SMSA constituted the relevant geographic market for antitrust analysis. Residents of the SMSA relied almost exclusively on hospitals in Springfield for their care. Patients in the SMSA received their pathological services almost exclusively from pathologists practicing in the SMSA. Evidence also demonstrated that, within this market, APL's contract with the Hospital had anticompetitive effects in terms of both the cost and quality of pathological services.

(5) While the contract between the Hospital and APL tied pathological services to the Hospital, unrebutted expert evidence concluded that this arrangement was unusual and unnecessary for pathology. Anatomical pathologists need not be hospital-based. Their work is sometimes specifically requested by physicians and anatomical pathologists may directly consult with physicians. Even when pathology tests need to be performed in the laboratory, they need not be tied to a particular hospital. One clinic maintained its own laboratory for certain tests. Other medical institutions sent their pathology work to the Hospital for APL to analyze. The Hospital itself used independent labs not affiliated with any hospital for tests which were not economically feasible to perform within the Hospital. Two such labs had existed in Springfield but had been driven out of business not long before Dr. Collins was excluded from the market. Moreover, pathology was the only department for which the Hospital had an exclusive contract. Thus, unrefuted expert evidence concluded that the demand for pathological services was distinct from that for hospital services.

(6) Respondents moved for summary judgment, which the District Court granted on February 11, 1987. Dr. Collins appealed and, on April 20, 1988, the United States Court of Appeals for the Seventh Circuit affirmed.

REASONS FOR GRANTING THE PETITION

I. THE UNITED STATES COURT OF APPEALS MISAPPLIED STANDARDS FOR SUMMARY JUDGMENT SET FORTH BY THIS COURT IN MATSUSHITA BY SUBSTITUTING ITS "QUALITATIVE" AND "QUANTITATIVE" REVIEW OF A CLAIM FOR THE FACTFINDER'S PROPER WEIGHING OF MATERIAL FACTS AND UNREBUTTED EXPERT TESTIMONY.

The standards for assessing a motion for summary judgment have long been clear. F.R.C.P. 56(c) provides that summary judgment should only be granted:

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no* genuine issue as to *any* material fact and that the moving party is entitled to a judgment as *a matter of law*. (emphasis added).

In evaluating a motion for summary judgment "the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 159-60 (1970); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). "The plaintiff, to survive the defendant's motion, need only present evidence

from which a jury *might* return a verdict in his favor,'' *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2514 (1986) (emphasis added), as the ''purpose of the rule is not to cut litigants off from their right to trial by jury if they really have issues to try.'' *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944).

While *Matsushita* reaffirmed these classic principles of summary judgment, the Seventh Circuit interpreted the case as creating a ''seemingly new evidentiary standard for summary judgments.'' 844 F.2d at 476, App. *infra* 5. The Seventh Circuit stated that *Matsushita's* emphasis that there must be a genuine issue for trial "indicates that a summary judgment motion is like a trial motion for a directed verdict and that 'genuine' allows some quantitative determination of the sufficiency of the evidence." 844 F.2d at 476, App. *infra* 5. Moreover, the appellate court said, *Matsushita* ''seems to require lower courts to engage in a qualitative review of the claim that goes beyond a minimum quantitative sufficiency of the evidence type of review," 844 F.2d at 476, App. *infra* 6. Applying *Matsushita,* the appellate court found that ''summary judgment is not only permitted but encouraged in certain circumstances, including antitrust cases,'' 844 F.2d at 475, App. *infra* 3. On this basis the court affirmed the district court's dismissal on summary judgment of both Dr. Collins' federal and state claims.

The Seventh Circuit's reading of *Matsushita* marks a startling departure from the prudent limits of the judicial role in determining the existence of a genuine issue of material fact requiring resolution by a jury. By misapplying the standards for summary judgment set forth by this Court in *Matsushita,* the Seventh Circuit usurped the role

of the factfinder. Under the guise of passing "qualitative" judgment of the "genuineness" of Dr. Collins' factual claim, the appellate court substituted its interpretation of the facts for the abundant evidence and unrefuted expert evidence that was before the court. This it had no right to do. As this Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2513 (1986):

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

The weighing of admissible expert testimony is the province of the jury. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944).

Rather than "encouraging" summary judgment, this Court emphasized in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. at 2513-14:

> Neither do we suggest that the trial courts should act other than with caution in granting summary judgment.

Matsushita's emphasis that the underlying claim must be genuine means that courts need not consider a claim that is legally deficient—"one that simply makes no economic sense", merely because a party opposing summary judgment can point to facts in dispute. *Matsushita,* 475 U.S. at 587. There was no finding that Dr. Collins lacked a plausible legal theory. That theory was amply supported by evidence.

The Seventh Circuit's treatment of several facts essential to Dr. Collins' claim demonstrates a dangerous extension of the court's summary judgment power to conduct a "qualitative" review of a claim that displaces the role of the factfinder. In effect, the Seventh Circuit simply substituted its own factual findings for those of the District Court and for the facts in the record before it.

A. The Seventh Circuit Disregarded Evidence of Consumer Impact.

The Seventh Circuit's "qualitative" disregard of evidence led it to find the national employment market for pathologists to be the relevant market. Thus, it concluded that "the contract between St. John's and APL for the provision of pathological services *could not have had* an impact on patients," 844 F.2d at 478, App. *infra* 10 (emphasis added), even though evidence showed that this Contract adversely affected both the quality and cost of patient services. In doing so, the appellate court simply ignored Dr. Collins' evidence and substituted its own ill-conceived perception of the market for those of Dr. Collins' experts.

As to quality of services, the appellate court ignored evidence that:

- The Hospital had a shortage of anatomical pathologists, Dr. Collins' field of speciality.
- There were delays in the provision of pathological services.
- The Hospital relied on antiquated equipment for pathological services.

As to cost of services, the appellate court ignored evidence that:

- Had a non-APL pathologist provided patients pathological services at the Hospital, by the terms of the Contract, the patient would have been billed twice—once by the treating pathologist and once by APL.
- For the same test, APL charged higher rates when it was performed on a registered specimen —one taken from an in-patient or out-patient at the Hospital—than when it was performed on an unregistered specimen—one sent to APL for analysis from outside the Hospital. The Contract gave APL exclusive access to registered specimens.
- APL charged physicians' rates even when technicians performed pathological work.

As to the existence of a separate market for pathological services in SMSA, the appellate court "qualitatively" dispensed with Dr. Collins' unrebutted expert testimony supporting such a market. In contrast to *Matsushita,* not even the court below was willing to suggest that such expert opinion was without economic sense.

B. The Seventh Circuit Disregarded Evidence of Distinct Demand for Pathological Services.

While the definition of the relevant market for an antitrust claim is generally a question of fact, *Aspen Highland Skiing Corp. v. Aspen Skiing Co.,* 738 F.2d 1509, 1514 n.4 (10th Cir. 1984), *aff'd,* 472 U.S. 585 (1985); *Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories Corp.,* 1987-2 Trade Cases (CCH) ¶ 67,683 (11th Cir. 1987); *Twin City Sportservice v. Charles O. Finley & Co.,* 676 F.2d 1291, 1299 (9th Cir.), *cert denied,* 459 U.S. 1009 (1982), the Seventh Circuit found as a matter of law that the relevant market was the nationwide market in which

pathologists compete for positions. The appellate court's conclusion was based on its determination that demand for pathological services was indistinct from that for hospital services because of (1) "overwhelming" evidence that "patients never request and physicians rarely request specific pathologists" and (2) evidence that pathology was a laboratory-based specialty so that the pathologist had no face to face contact with the patient and treating physician, 844 F.2d at 477, App. *infra* 8.

The appellate court's recourse to "overwhelming" evidence disguised its qualitative decision to disregard evidence and expert opinion at odds with its own preconceived notions of the health care market. Dr. Collins presented facts which, at the very least, created a disputed question of fact as to whether there was a separate demand for Dr. Collins' pathological services. The appellate court's qualitative review ignored that:

- Unrebutted expert evidence stated that pathological services were a separate service market from hospital services and that the SMSA was the relevant geographic market.
- Deposition testimony showed that physicians did distinguish particular providers of pathological services based on whether the providers had the capability to perform particular tests. Physicians may directly consult with anatomical pathologists such as Dr. Collins. A number of physicians petitioned the Hospital to let Dr. Collins remain on staff to perform pathological work on their behalf.
- Pathological services need not be hospital based. Patients need not be hospitalized to receive pathological services. Independent laboratories exist. Two such labs existed in Springfield but closed.

The Hospital even used independent labs for tests which were not economically feasible to perform on premises.

- The Hospital treated pathology as a discrete department for which patients were separately billed. Only licensed pathologists can provide pathological services and no service can be reasonably interchanged for the performance of pathological services by a licensed pathologist.

The weighing of this evidence is the function of a jury and should not be allowed to be misappropriated by the courts.

C. The Seventh Circuit Disregarded Evidence that Dr. Collins Lost Staff Privileges.

The Seventh Circuit's extension of summary judgment to squelch Dr. Collins' right to a jury trial on his staff privileges claims represented another triumph of legerdemain. The appellate court's conclusion that "the record reflects that St. John's has neither removed nor reduced Dr. Collins' staff privileges," 844 F.2d 473, App. *infra* 17, ignored basic principles of contract and tort law, as well as the following facts:

- Unrebutted expert evidence concluded Dr. Collins had been deprived of his staff privileges in violation of Hospital bylaws.
- By the Hospital bylaws, staff privileges could be neither removed nor reduced without the physician receiving *prior* notice and hearing and thereafter having the right to appeal.
- It was undisputed that the Hospital defined staff privileges as the ability to practice at the Hospital in physician's field of specialty, including pathology.

- The Hospital had previously interpreted its bylaws to require hearings in situations involving other hospital-based physicians.
- Following his termination by APL, Collins could no longer practice anatomical pathology at the Hospital.

Regardless of whether the standards for summary judgment contemplate quantitative or qualitative evaluation of the claim, nothing in *Matsushita* or any other case of this Court entitles a court to sweep aside such evidence.* The Seventh Circuit's misapplication of the proper standards for summary judgment as set forth in this Court's decisions is a sufficient basis for this Court's granting certiorari. U.S. Supreme Court Rule 17.1(c).

II. BY MISAPPLYING THE STANDARDS FOR DETERMINING THE RELEVANT MARKET SET FORTH BY THIS COURT IN HYDE, THE SEVENTH CIRCUIT ERRONEOUSLY AND UNPRECEDENTLY ADOPTED A NATIONAL EMPLOYMENT MARKET RATHER THAN A LOCAL SERVICE MARKET AND IGNORED THE CONSUMER, WHOSE INTERESTS THE ANTITRUST LAWS EXIST TO PROTECT.

The definition of the relevant market aids courts in assessing the competitive impact of an arrangement on consumers. Once a market is defined, a court can determine if a seller has market power—the ability "to force a

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*Other circuits have emphasized the close scrutiny which must be given on summary judgment to claims of deprivation of staff privileges when these allegedly result from a violation of the antitrust laws. *Miller v. Indiana Hospital*, 843 F.2d 139 (3d Cir. 1988), *petition for certiorari filed*, Docket No. 27-2093.

purchaser to do something that he would not do in a competitive market." *Jefferson Parish Hospital Dist. No. 2 v. Hyde,* 466 U.S. 2, 14 (1984). Power in one market offends the antitrust laws when it is exploited to control a second market to the detriment of consumers. *Id.* at 15. As this Court stated in *Hyde,* the determination of whether two markets are distinct, "turns not on the functional relation between them, but rather on the character of the demand for the two items." *Id.* at 19. That one product is the component of another or is functionally linked to another will not prevent the finding of two markets. *Id.* at n. 30; *Mercoid Corp. v. Mid-Continent Investment Co.,* 320 U.S. 661 (1944); *Morton Salt Co. v. G. S. Suppiger Co.,* 314 U.S. 488 (1942); *United States v. Jerrold Electronics Corp.,* 187 F. Supp. 545, 558-60 (E.D. Pa. 1960), *aff'd,* 365 U.S. 567 (1961) (per curiam). Once the relevant product is determined, the relevant geographic market is the "area of effective competition" for that product. *Tampa Electric Co. v. Nashville Coal Co.,* 365 U.S. 320, 328 (1961).

A. The Seventh Circuit's Definition of the Relevant Product as Pathologists Rather Than Pathological Services is Contrary to Hyde.

While paying lip service to the dictates of this Court in *Jefferson Parish Hospital Dist. No. 2 v. Hyde,* 466 U.S. 2, 19 (1984), that the relevant product inquiry must focus on the character of demand for the service in question, the Seventh Circuit erroneously reduced that inquiry to whether patients specifically request pathologists by name. While one factor noted in *Hyde,* patient requests for a particular physician do not, alone, determine what constitutes the relevant service market. This Court in *Hyde* also weighed such factors as that anesthesiology services were

separately billed by the hospital, 466 U.S. at 22, that physicians select particular anesthesiologists, 466 U.S. at 23, and that the hospital required that such services be purchased from a partcular group even though other providers were available. *Id.* at 23-24 n.39. If all the criteria looked to in *Hyde* are evaluated in the case at bar, it is clear that the appellate court erred in determining that pathological services are not a distinct market.

Hyde recognized that exclusive contracts between hospitals and groups of physicians have an impact on "consumers of medical services," 466 U.S. at 7, and that these consumers were the intended beneficiaries of the antitrust laws. *Id.* at 15. Hyde, therefore, requires courts to consider consumer impact in evaluating an antitrust claim. Ironically, while the Seventh Circuit defined the relevant market solely by looking at consumer requests for pathological services, it ignored entirely the adverse effects which the Contract had upon these consumers. The misapplication of *Hyde* has led to the incongruous result that certain exclusive contracts between hospitals and physicians such as anesthesiologists are subject to antitrust scrutiny while others are effectively insulated, even where evidence demonstrates they impair the cost and quality of medical care.

B. The Seventh Circuit's Definition of the Relevant Geographic Market as the Nation Is Contrary to Hyde In That it Ignores The Anticompetitive Effect in the Local Market.

Because it had misapplied *Hyde* to reach a flawed determination of the relevant service market, the Seventh Circuit adopted a definition of the relevant geographic market at odds with this Court's prior holdings. After de-

termining that pathologists were the relevant commodity, the Seventh Circuit noted that pathologists went from state to state in competition for jobs and concluded that the nationwide recruiting market for pathologists was the relevant geographic market. The lower court's muddling of the distinction between providers of a service and the underlying service provided not only makes for bad economics, it has profound consequences for innumerable areas of commerce and for state and local antitrust enforcement, as it eliminates from the antitrust calculus the impact of an arrangement on the intended beneficiaries of the antitrust laws—consumers—and departs from the longstanding principle that a functional component of a product or service may still constitute a separate market.

The appellate court's unprecedented adoption of a nationwide recruiting market as the relevant market in evaluating a physician's antitrust claim was based on its flawed interpretation of this Court's ruling in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961). The Seventh Circuit compared the Hospital to the purchasing utility in *Tampa Electric* and compared APL to the coal company which supplied the utility in that case. The court failed to carry that analogy to its logical conclusion, however, as what APL supplies the Hospital would be compared to the coal supplied to the utility in *Tampa Electric*. APL by the Contract supplied the Hospital not with *pathologists* but with "complete and adequate professional pathology *service*".

Based on its reading of *Tampa Electric*, the Seventh Circuit focused on where the providers of the service can relocate and found this to be national. But this Court in

Tampa Electric did not look at whether the companies that supplied energy could move corporate headquarters. Instead, that case focused on "the area of effective competition" for the product—coal—sold by the companies, 365 U.S. at 328.

The Seventh Circuit also erroneously relied on *Tampa Electric* as justification for ignoring the impact of the Contract on consumers of medical services. 844 F.2d at 478, App. *infra* 10-11. However, *Tampa Electric* does not support this disregard of material evidence. *Tampa Electric* does not say that a court should ignore the impact of a service arrangement upon consumers. Rather, the facts of *Tampa Electric* made an examination of impact on consumers unnecessary. Coal at the time accounted for only six percent of the energy produced in the relevant state of Florida. While the contract at issue in *Tampa Electric* concerned only one coal supplier, over 700 companies supplied coal in Florida. Thus, it was clear that one coal supplier would have a negligible impact on consumers' energy needs.

Much more directly on point is *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). *Hyde* did not emphasize where the doctors that comprised the defendant group of anesthesiologists came from. Had this Court done so, surely anesthesiologists would have been found to be as mobile in securing employment as pathologists are. Rather, this Court looked to the area in which the *group* of anesthesiologists competed for jobs and the effect the exclusive group contract had on consumers of anesthesiology services.

Hyde did not suggest a nationwide market was appropriate in evaluating a physician's antitrust claim. On

the contrary, it recognized that the relevant market might be "merely local," 466 U.S. at 29. Analogous cases assessing physicians' antitrust claims have looked to the area in which the physicians provided their medical services and concluded that a local market was the relevant market. *Cf. Patrick v. Burget*, — U.S. —, 108 S.Ct. 1658 (1988) (implicitly accepting a local market—Astoria, Oregon—in finding that state action doctrine did not protect hospital peer review process from physician's antitrust claim); *Weiss v. York Hospital*, 745 F.2d 786, 825 (3d Cir.), *cert. denied*, 409 U.S. 1007 (1984) (adopting York, Pennsylvania Metropolitan Area as relevant market); *Robinson v. Magovern*, 521 F. Supp. 842, 881 (W.D. Pa. 1981), *aff'd*, 688 F.2d 824 (3d Cir.), *cert. denied*, 459 U.S. 971 (1982) (adopting sixteen county area surrounding Pittsburgh, Pennsylvania as relevant market).

Evidence in the case at bar showed that the relevant market is local. The market was for pathological services—not pathologists—and those services were provided and consumed virtually exclusively in the SMSA. There were no competitors of APL from outside the area, nor did it compete elsewhere in the state. APL controlled nearly 60% of the pathological services in the SMSA. Hospitals, physicians and patients residing in the SMSA received the overwhelming share of their pathological services in the SMSA from pathologists whose practice was almost wholly confined to the SMSA.

In an age of spiraling medical costs, the Seventh Circuit's misapplication of *Hyde* not only effectively strips pathologists of their ability to challenge exclusive contracts, but also strips consumers of medical services of

their right to challenge such agreements. Even though evidence before the Court demonstrated that these contracts affected the cost and quality of services to patients, the appellate court concluded as a matter of law that such contracts "could not have had an impact on patients." 844 F.2d at 478, App. *infra* 10.

That the Seventh Circuit has decided an important question of federal antitrust law at odds with the decisions of this Court is another basis for this Court's granting certiorari. U.S. Supreme Court Rule 17.1(c).

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CONCLUSION

The petition for a Writ of Certiorari should be granted and set down for briefing and argument on the merits. Alternatively, the petition should be granted summarily and the decision of the United States Court of Appeals for the Seventh Circuit should be vacated and the case remanded for further consideration in light of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 476 U.S. 574 (1986) and *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

Respectfully submitted,

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Dated: July 19, 1988

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

James G.P. COLLINS,
Plaintiff-Appellant,

v.

ASSOCIATED PATHOLOGISTS, LTD.,
et al., Defendants-Appellees.

No. 87-1399.

Argued October 27, 1987—Decided April 20, 1988

Before CUMMINGS, COFFEY and EASTERBROOK, Circuit Judges.

CUMMINGS, Circuit Judge.

Plaintiff Dr. James G.P. Collins, a pathologist, is currently employed and practicing his specialty in San Leandro, California. Dr. Collins claims that he was forced to accept his current position after antitrust violations deprived him of his former position at St. John's Hospital in Springfield, Illinois.[1] More specifically, in a ten-count amended complaint Dr. Collins alleged that the contractual arrangement between St. John's and Associated Pathologists, Ltd. ("APL"), the group providing pathology services to the hospital, was a combination in restraint of trade, an unlawful boycott, and an unlawful tying agree-

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1. Dr. Collins is not unique in turning to antitrust laws for relief. Yet despite the growing frequency with which doctors file antitrust claims they have had little success. See Enders, *Federal Antitrust Issues Involved in the Denial of Medical Staff Privileges,* 17 Loy.U.Chi.L.J. 331 (1986).

ment. Dr. Collins also accused APL of monopolization, attempted monopolization and conspiracy to monopolize the provision of pathology services. Finally, Dr. Collins' pendent state claims alleged violations of state antitrust law, breach of contract, misrepresentation, wrongful removal or reduction in staff privileges and tortious interference with staff privileges. Defendants St. John's Hospital and APL[2] filed motions for summary judgment. In a thorough opinion, Judge Mihm painstakingly examined the voluminous discovery material filed in this case and concluded that Dr. Collins failed to raise a genuine issue of material fact with regard to any of his claims. 676 F.Supp. 1388, 1411 (C.D.Ill.1987). Accordingly, the court granted the defendants' motions for summary judgment. We affirm on all counts that are still pressed.[3]

I

From October 1974 through January 31, 1982, when the directors of APL asked for and received Dr. Collins' resignation, Dr. Collins was an employee and, for most of that period, a shareholder of APL. Throughout the period in which he was employed by APL, Dr. Collins worked under contracts between APL and St. John's as a pathologist

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2. Collins filed suit against APL, the corporation, as well as the four pathologists employed by the corporation, each of whom was sued individually. The estate of a fifth individual pathologist was named as a defendant in Collins' second amended complaint. However, as Jessie Fulcher, executrix of the estate of the fifth pathologist, Dr. J. Herschel Fulcher, Jr., is not listed by the plaintiff's or the other defendants' brief as an appellee and has not filed a brief in this Court, the estate appears to have been dropped as a defendant.

3. Count VII, breach of contract, and Count VIII, misrepresentation, have evidently been abandoned. Plaintiff's briefs and oral argument do not fault the district court's disposition of those counts. See 676 F.Supp. at 1408-1410.

at St. John's. The contracts between APL and St. John's required APL to provide complete and adequate pathology services to St. John's. APL's contractual obligation to provide pathology services included engaging the staff necessary to provide "full and complete professional service for the department."

Following his forced resignation from APL in January 1982, Dr. Collins sought to continue his employment at St. John's as an independent pathologist, separate from the APL contract. Although St. John's did not remove or reduce Dr. Collins' staff privileges, it refused to employ him as a pathologist. This refusal and the contractual relationships surrounding it provide the bases for Dr. Collins' claims.

II

Dr. Collins begins his argument by challenging the standard for summary judgment employed by the district court. He cites *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962), for the proposition that courts should hesitate before granting summary judgment in complex antitrust litigation. His argument ignores cases in this Circuit limiting *Poller* and noting that the very nature of antitrust litigation encourages summary disposition of such cases when permissible, see *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir.1984), certiorari denied, 470 U.S. 1054, 105 S.Ct. 1758, 84 L.Ed.2d 821 (1985); *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549 (7th Cir.1980); *Lupia v. Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163, 1166 (7th Cir.1978), certiorari denied, 440 U.S. 982, 99 S.Ct. 1791, 60 L.Ed.2d 242 (1979), as well as the recent trilogy of cases in which the Supreme Court made clear that, contrary to the em-

phasis of some prior precedent, the use of summary judgment is not only permitted but encouraged in certain circumstances, including antitrust cases, *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); see generally Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court,* 116 F.R.D. 183 (1987).

The first of the trilogy cases, *Matsushita,* is especially instructive because it involved the grant of a summary judgment motion in complex antitrust litigation. The plaintiffs in that case, Zenith and National Union Electric Corporation, filed suit alleging that 21 corporations, Japanese manufacturers of consumer electronic products and their American subsidiaries that sold the products in this country, had illegally conspired to drive American firms from the market through a concerted predatory pricing scheme. The district court found that any inference of conspiracy was unreasonable because (1) some portions of the evidence suggested that defendants conspired in ways that did not injure plaintiffs, and (2) the evidence that bore directly on the price-cutting conspiracy did not rebut the more plausible inference that petitioners were cutting prices to compete in the American market, not to monopolize it. The court then granted summary judgment in favor of all defendants on all counts.

The Court of Appeals for the Third Circuit reversed. It concluded that a reasonable factfinder could find a conspiracy. Commenting on the Third Circuit's opinion, the Supreme Court noted that the circuit court had not considered if it was as plausible to conclude that defendants'

price-cutting behavior was independent as it was to conclude that it was conspiratorial. The Supreme Court reversed and remanded, ordering that the summary judgment be reinstated unless the Third Circuit could find some other evidence in the record that excluded the possibility that defendants underpriced plaintiffs to compete for business rather than to implement an economically senseless conspiracy. *Id.* 475 U.S. at 597-598, 106 S.Ct. at 1362.

In reversing the circuit court the Supreme Court relied on a seemingly new evidentiary standard for summary judgments. The Court restated the language of Fed.Rule Civ.Proc. 56(e) requiring the non-moving party to establish that there is a genuine issue of material fact, but the Court redefined "genuine." *Id.* at 586-587, 106 S.Ct. at 1356. It stated: "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* This means that "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Id.* This language indicates that a summary judgment motion is like a trial motion for a directed verdict and that "genuine" allows some quantitative determination of the sufficiency of the evidence. The trial court still cannot resolve factual disputes that could go to a jury at trial, but weak factual claims can be weeded out through summary judgment motions. The existence of a triable issue is no longer sufficient to survive a motion for summary judgment. *Id.* at 587, 106 S.Ct. at 1356. Instead, the triable issue must be evaluated in its factual context, which suggests that the test for summary judgment is whether sufficient evidence exists in the pre-trial record to allow the non-moving party to survive a motion for directed verdict. See Childress, 116 F.R.D. at 186.

Further, the Supreme Court seems to require lower courts to engage in a qualitative review of the claim that goes beyond a minimum quantitative sufficiency of the evidence type of review. "It follows from these settled principles that if the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim that would otherwise be necessary." *Matsushita,* 475 U.S. 587, 106 S. Ct. at 1356. "[T]he absence of any plausible motive to engage in the conduct charged is highly relevant to whether a 'genuine issue for trial' exists. Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." *Id.* at 596-597, 106 S.Ct. at 1361. *Matsushita,* not *Poller,* is now the applicable standard and the district court in this case applied it correctly.

III

In Count III of his amended complaint, Dr. Collins asserts that the series of consecutive contracts between APL and St. John's created and maintained an illegal tying arrangement in violation of Section 1 of the Sherman Act. Each of the three contracts required APL to provide complete and adequate pathology services to St. John's. St. John's then included the pathology services provided by APL in the package St. John's presented to its patients. This package included the full range of facilities and services necessary for the patients' treatment and

maintenance in the hospital. As a result of this arrangement, patients who required pathology services purchased those provided for in the package—the services of APL.

Dr. Collins contends that this arrangement constitutes illegal tying. However, a tying arrangement demands by definition two separate products—a tying product and a tied product. In an attempt to satisfy this requisite, Dr. Collins argues that the tied product consists of the hospital facilities and services provided to patients at St. John's and that the typing product consists of the pathology services provided by the individual defendants.

Whether hospital services and pathology services are, as Dr. Collins asserts, two separate products "turns not on the functional relationship between them, but rather *on the character of the demand for the two items.*" *Collins,* 676 F.Supp. at 1402 (emphasis in original) (quoting *Jefferson Parish Hospital Dist. No. 2 v. Hyde,* 466 U.S. 2, 19, 104 S.Ct. 1551, 1562, 80 L.Ed.2d 2). Therefore, in this case no tying arrangement can exist unless there is a distinct demand for the purchase of pathological services by hospital patients separate from the demand for the hospital facilities and services provided by St. John's; and further, this demand must be sufficient to identify a distinct product market in which it is efficient to offer pathological services separately from hospital services. See *Jefferson Parish,* 466 U.S. at 22-23, 104 S.Ct. at 1563-1564.

An indicator of whether a separate demand exists for a product is whether consumers make specific requests. In *Jefferson Parish,* the plaintiff anesthesiologist supported his tying claim with "ample and uncontroverted

testimony that patients or surgeons often request specific anesthesiologists to come to a hospital to provide anesthesia, and that the choice of an individual anesthesiologist separate from the choice of a hospital is particularly frequent in respondent's specialty, obstetric anesthesiology." *Jeffersoni Parish,* 466 U.S. at 22, 104 S.Ct. at 1564. In contrast, the evidence presented in this case is overwhelming that patients never request and physicians rarely request specific pathologists. The evidence presented here also established that pathology is a laboratory-based specialty, so that the pathologist, unlike the anesthesiologist, has no face-to-face contact with the patient and the treating physician. Clearly, the relationship between hospitals and pathologists differs from that of hospitals and anesthesiologists. See *id.* at 23, n. 36, 104 S.Ct. at 1564, n. 36 (specifically recognizing that "anesthesiologists may differ from radiologists, pathologists and other types of hospital-based physicians").

Contrary to the finding of the Supreme Court in *Jefferson Parish* that "the record amply supports the conclusion that consumers differentiate between anesthesiological services and other hospital services provided by [the defendant hospital]," *id.* at 23, 104 S.Ct. at 1564, the district court in Dr. Collins' case found that pathology services are just one of the many services provided by the hospital for its patients. As such, no separate demand exists for pathological services that is sufficient to create a separate market. 676 F.Supp. at 1403; see also, *Drs. Steuer and Latham v. National Medical Enterprises, Inc.,* 672 F.Supp. 1489, 1506-1508 (D.S.C.1987) (in which the record contained uncontroverted evidence consistent with and supportive of the reasoning of the district court here-

in that pathology services are not a product separate from hospital services). Because pathology services are not a separate and distinct product from hospital services, they combine in the form of one product, not two tied products. Without two products, the alleged tying arrangement is impossible.

IV

Dr. Collins also argues that the agreements entered into between St. John's and APL are exclusive contracts that constitute unreasonable restraints of trade in violation of Section 1 of the Sherman Act. Whether the agreements were indeed exclusive is a disputed factual issue, but the district court nevertheless granted summary judgment in favor of the defendants because it held that "the agreements are not an unreasonable restraint of trade even if they operate as exclusive contracts." *Collins*, 676 F. Supp. at 1394. We affirm the grant of summary judgment.

Not all exclusive contracts violate the Sherman Act. Whether a particular contract does so depends on the effect that contract has upon competition in the relevant market place. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 81 S.Ct. 623, 628, 5 L.Ed.2d 580 (1961).[4]

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4. Although *Tampa Electric* was brought under Section 3 of the Clayton Act, courts routinely rely on its analysis for cases arising under Sections 1 and 2 of the Sherman Act. Since the proscription of Section 3 of the Clayton Act is broader than that of Sections 1 and 2 of the Sherman Act, if a contract does not fall within the relevant market coverage of the Clayton Act it is not forbidden by the Sherman Act. In addition, while Section 3 of the Clayton Act does not apply to services, *Chelson v. Oregonian Pub. Co.*, 715 F.2d 1368, 1372 (9th Cir. 1983), reference is still appropriate for the analogous "relevant market" jurisprudence thereunder.

The controlling factor in this determination is the relevant market area. *Id.* at 329, 81 S.Ct. at 629. Thus we must determine the relevant market, which in this case first requires clarification of the relevant product.

The relevant product here is pathologists, not pathology services, and the corresponding relevant market is the market in which pathologists compete for jobs, not the market in which hospitals compete in offering pathology services to patients. This conclusion is reached both by application of our earlier holding that no market exists for pathology services separate from hospital services and by an analysis of the exclusive dealing claim under the provisions of *Tampa Electric*.

First, as we held earlier, from the perspective of consumers of medical services, the patients in St. John's, there is no distinct demand for and thus no market for pathological services. See *supra* at [A-7-8]. Therefore the contract between St. John's and APL for the provision of pathological services could not have had an impact on patients. The only segment possibly affected by the contract is that of providers of pathological services, namely, hospitals and clinical laboratories. Therefore the exclusive contract affects where pathologists can be employed and the relevant market is the market in which pathologists compete for jobs.

The same conclusion results from an analysis of the exclusive dealing claim alone and begins with *Tampa Electric*. The exclusive contract at issue there was a protracted requirements contract between a public utility, Tampa Electric Co., and a coal company. In its determination of whether the contract was an unreasonable restraint

of trade that foreclosed competition, the Court did not consider any impact the contract might have on the consumers who purchased the resultant electricity. Instead, the Court focused on potential competitors of the party to the contract with Tampa Electric, other coal companies. The Court looked to the other coal companies that could have supplied Tampa Electric and concluded that the relevant market area was the area in which these coal companies competed. *Id.* at 330-333, 81 S.Ct. at 629-631.

As the district court noted, in the present case, St. John's is in the position of Tampa Electric and APL is in the position of the supplying coal company. 676 F.Supp. at 1395. In determining whether this exclusive arrangement forecloses competition, the focus is upon competition between pathologists for the right to practice at St. John's. So the contract must be viewed in light of its effect on pathologists competing for work, not from the effect on patients at St. John's whose options are limited.

Thus the market that must be determined is that in which pathologists compete for jobs. This market is not necessarily the same as the market in which hospitals compete in offering the services procured by the contract to patients, see *Jefferson Parish*, 466 U.S. at 29, 104 S. Ct. at 1567, and in this case it is not the same. The district court found that Dr. Collins failed to show that the market hospitals look to in hiring pathologists is anything but nationwide. 676 F.Supp. at 1405. The only evidence in the record regarding the scope of the market is that a nationwide market exists for hospitals to hire pathologists. Dr. Collins' own experience demonstrates the coast-to-coast market. He practiced in Brooklyn, New York, be-

fore joining APL and practicing at St. John's in Springfield, Illinois. When he left Springfield, he found work in San Leandro, California. Most of the other pathologists employed by APL during the years in question were also from out of state, as are most of the pathologists employed by Dr. Collins' current employer Humana Hospital. Dr. Collins' deposition testimony also admits the national scope of the market, reflected in the national listings of both pathologists and hospitals in the College of American Pathologists' placement service list and in the advertisements in the *New England Journal of Medicine*, a national publication.

The district court held that because the market is nationwide, even if the contract between APL and St. John's excluded Dr. Collins from the local Springfield market, a substantial number of other opportunities were available to him (and other pathologists) for practicing pathology and thus no genuine issue of material fact was in dispute regarding the effect of the agreement on competition. We agree.

V

In his memorandum in response to the Defendants' Motions for Summary Judgment, Dr. Collins argued that the exclusive agreement between St. John's and APL constitutes an illegal boycott in violation of Section I of the Sherman Act. Although an illegal boycott is not specifically alleged in Dr. Collins' amended complaint, the district court found that the broad language of Count I, alleging that the defendants engaged in a combination in restraint of trade, encompassed the idea of an illegal boycott and allowed the theory to be read into the complaint. The

court, however, rejected Dr. Collins' assertion of a *per se* standard and under a rule of reason analysis granted summary judgment in favor of the defendants.

On appeal, Dr. Collins challenges the district court's analysis of several recent decisions by this Court applying the rule of reason in boycott cases. This challenge is meritless. The district court thoroughly and correctly applied the rule of this Circuit to the facts of Dr. Collins' case.

In *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1155 (7th Cir.1984) (*en banc*), reversed on other grounds, 470 U.S. 373, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985), we stated, "in this circuit at least 'boycotts are illegal per se only if used to enforce agreements that are themselves illegal per se—for example price fixing agreements'" (quoting an earlier panel opinion in that case, 706 F.2d 1488, 1495 (7th Cir.1983)). See also *Wilk v. American Medical Ass'n*, 719 F.2d 207, 221 (7th Cir.1983); *United States Trotting Ass'n v. Chicago Downs Ass'n*, 665 F.2d 781, 787-790 (7th Cir.1981) (*en banc*). Thus under the law of this Circuit, even if the individual members of APL combined in a horizontal group boycott to exclude Dr. Collins from practice at St. John's, the boycott would be illegal *per se* only if the agreement the individual members of APL combined to enforce was itself illegal *per se*.

If the individual members of APL did combine to persuade St. John's not to hire Dr. Collins as an independent pathologist, they did so to enforce their contract with St. John's under which it was agreed that APL would provide complete and adequate professional pathology ser-

vices. This agreement did not violate Section 1 of the Sherman Act. See *supra* at [A-12]. Because the agreement the alleged boycott was used to enforce was not illegal, much less illegal, *per se*, the district court correctly applied the rule of reason as the applicable standard.

VI

Dr. Collins' final federal antitrust claim is against APL and the individual defendants for attempted monopolization and abuse of monopoly power. In his appellate brief Dr. Collins accuses the district court of ignoring both his evidence and his claim. Neither is true. What the district court did was rely on its earlier tying analysis in a manner that prevented anomalous holdings.

Dr. Collins argued that the relevant geographic market that APL monopolized or attempted to monopolize was the market for pathological services at St. John's hospital. Accepting the relevant market proposed by Dr. Collins,[5] the allegations of monopolization had to fail. In analyzing Dr. Collins' tying argument the court held as a matter of law that there is no distinct product market consisting of providing pathological services to individual patients of St. John's. It is impossible to monopolize a market that does not exist.

The district court also held that Dr. Collins could not state a claim against the APL defendants for monopoliza-

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5. The district court noted, and we agree, that Dr. Collins is slicing the geographic market much to thin in limiting the relevant market for pathology services to St. John's hospital. 676 F.Supp. at 1405. As we stated in *Dos Santos v. Columbus-Cuneo-Cabrini Medical Center*, 684 F.2d 1346, 1353 (7th Cir. 1982), "we have reason to doubt whether the relevant market can be sliced so small as to embrace only a single hospital."

tion or attempted monopolization of a broader market, the Springfield Metropolitan Statistical Area ("SMSA"), for pathological services without including St. John's hospital as a defendant. The allegations in Dr. Collins' brief before this Court admit as much: "[t]hrough its excessive access to the dominant hospital [St. John's] in the SMSA, APL has enjoyed an increasing share of the market for pathology services in the SMSA" (Br. 14). Dr. Collins cannot bring a claim of monopolization or attempted monopolization against the APL defendants without showing some type of effort at illegal monopolization on the part of St. John's hospital as well. Dr. Collins has made no such showing. The district court properly granted the defendants' motions for summary judgment regarding the monopolization claims.

VII

In addition to his federal antitrust claims, Dr. Collins claims violations of three sections of the Illinois Antitrust Act that parallel his Sherman Act counts. Ill. Rev.Stat. ch. 38, §§ 60-3(2), 60-3(3) and 60-3(4). The language of Section 60-3(2) closely tracks the language of Section 1 of the Sherman Act and the language of Section 60-3(3) is very similar to the language of Section 2 of the Sherman Act. Based upon these similarities, summary judgment was appropriate as to the counts based on Sections 60-3(2) and 60-3(3) for the reasons stated with respect to the parallel Sherman Act counts.

Although the result under Dr. Collins' third Illinois Antitrust Act claim under Section 60-3(4) is the same, the analysis is somewhat complicated by the holding of an Illinois Supreme Court case that antedates *Jefferson*

Parish, People v. Schwulst Building Center, Inc., 89 Ill. 2d 365, 59 Ill.Dec. 911, 432 N.E.2d 855 (1982). In *Schwulst Building* the Supreme Court of Illinois recognized that Section 60-3(4) is patterned after Section 3 of the Clayton Act. *Id.* at 374, 59 Ill.Dec. at 916, 432 N.E.2d at 860. It also noted that under Section 60-11 the Illinois section should be construed consistently with federal law. *Id.*[6] Thus the court in *Schwulst Building* felt bound to follow what it perceived the then existing federal law to be—the application of a *per se* test to exclusive dealing and tying arrangements. *Id.* (citing *Standard Oil Co. v. United States*, 337 U.S. 293, 304-305, 69 S.Ct. 1051, 1057-1058, 93 L.Ed. 1371 (*"Standard Stations"*); *International Salt Co. v. United States*, 332 U.S. 392, 396, 68 S.Ct. 12, 15, 92 L.Ed. 20).

Since the decision in *Schwulst Building*, the federal law that the Illinois courts are bound to follow in applying the Illinois Antitrust Act has changed. Recently we examined *Standard Stations*, the case on which *Schwulst Building* relied, and determined that "it now appears most unlikely that such agreements, whether challenged under section 3 of the Clayton Act or section 1 of the Sherman Act will be judged by the simple and strict test of *Standard Stations*. They will be judged under the Rule of Reason, and thus condemned only if found to restrain trade unreasonably." *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 393 (7th Cir.1984) (citing *Jefferson Parish*,

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6. Section 60-11 of the Illinois Antitrust Act requires that "[w]hen the wording of this Act is identical or similar to that of a federal antitrust law, the courts of this State shall use the construction of the federal law by the federal courts as a guide in construing this Act." 38 Ill.Rev.Stat. § 60-11.

466 U.S. at 45-46, 104 S.Ct. at 1575-1576 (concurring opinion)).

In light of the recent developments in federal antitrust law, the district court did not believe it was bound to apply the literal holding of *Schwulst Building* that Section 60-3(4) involves a *per se* analysis. 676 F.Supp. at 1407. We agree. Therefore, for the reasons stated regarding the parallel federal claim, the district court appropriately granted summary judgment.

VIII

Dr. Collins also asserts that St. John's wrongfully removed or reduced his staff privileges in violation of the by-laws of the hospital. However, the record reflects that St. John's has neither removed nor reduced Dr. Collins' staff privileges. In May 1982, Dr. Collins was, on his own request, placed on leave of absence, but he retains full staff privileges to this day. Staff privileges reflect the hospital's decision that a physician is qualified to practice in the facility, but do not in and of themselves confer employment. Employment as a pathologist at St. John's was determined by the legal contract between St. John's and APL. See *supra* at [A-6-7]. Although without concurrent employment by St. John's as a pathologist these staff privileges may be of little or no value to Dr. Collins, the fact remains that the privileges were neither removed nor reduced. We affirm the grant of summary judgment.

IX

Finally, Dr. Collins asserts that APL and the individual defendants tortiously interfered with his rela-

tionship with St. John's by inducing St. John's to remove or reduce his staff privileges and to exclude him from practicing at St. John's. As to the staff privileges assertion, we have already held that St. John's did not remove or reduce Dr. Collins' staff privileges. See *supra* at [A-14]. APL and the individual defendants therefore cannot be liable for inducing a result that never occurred. As to any actions by APL or the individual defendants to exclude Dr. Collins from practicing at St. John's, we have already held that any such action was pursuant to a legal arrangement. See *supra* at [A-14]. Such legal actions cannot form the basis for a tortious interference claim. Summary judgment was again appropriately granted.

We affirm the district court's judgment in all respects.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JAMES G.P. COLLINS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 84-1332
	)	
ASSOCIATED PATHOLOGISTS, LTD., et al,	)	
	)	
	)	
Defendants,	)	

ORDER

(Filed February 11, 1987)

The Plaintiff filed this antitrust lawsuit, claiming that he was prevented from practicing pathology at the hospital where he had worked for eight years, because his membership in the group providing such services to the hospital had been terminated. The Plaintiff, Dr. James G.P. Collins, contends that the contractual arrangement between the Defendant Hospital, St. John's Hospital and the Defendant pathological group, Associated Pathologists, Ltd., is an exclusive dealing arrangement and an illegal tying agreement in violation of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, and the Illinois Antitrust Act Ill.Rev.Stat., ch. 38, § 60-1 to § 60-11 (1983). The Plaintiff also argues that his dismissal from Associated Pathologists and the Hospital's subsequent refusal to hire him resulted in claims for breach of contract, unlawful withdrawal of staff privileges, and misrepresentation. After substantial discovery and voluminous filings by the

parties, this case is before the Court upon the Defendants' Motions for Summary Judgment.

STATEMENT OF FACTS

Associated Pathologists, Ltd., (APL) is an Illinois medical corporation whose principal employees are the individual Defendants, Doctors Donald Van Fossan, William M. Nickey, Jr., Victor H. Lary, and Alfonso J. Strano. Dr. J. Herschel Fulcher, Jr. was a member of the APL until his death in March of 1983, and Dr. Collins has named Jessie Fulcher, as executor of Dr. Fulcher's estate, a Defendant in this suit. St. John's Hospital of the Hospital Sisters of the Third Order of St. Francis (St. John's) is an Illinois not-for-profit corporation which owns and operates St. John's Hospital, located in Springfield, Illinois. St. John's Hospital is a tertiary care, private, not-for-profit teaching hospital affiliated with Southern Illinois University School of Medicine. It provides approximately 800 beds. There are two other hospitals located in Springfield, Illinois: Memorial Medical Center, a somewhat smaller, comparable tertiary care hospital and Humana Hospital of Springfield (formerly Springfield Community Hospital), a much smaller, for-profit institution that does not provide tertiary care.

Dr. Nickey came to Springfield in 1969 and entered into a contract with St. John's Hospital, the terms of which provided that Dr. Nickey would be responsible for the pathology department at the Hospital. Dr. Nickey replaced a group of pathologists who had been terminated by St. John's.

Within one month of coming to St. John's, Dr. Nickey recruited Dr. Van Fossan. APL was formed by the two

doctors on February 1, 1969. Dr. Herschel Fulcher (deceased March 1983) joined APL in 1969, and the pathology group added Dr. Victor Lary in 1970. APL entered into a new contract with St. John's Hospital on July 1, 1970.

In 1974, APL hired Dr. Alfonso J. Strano and Dr. James G.P. Collins. Both Dr. Collins and Dr. Strano became shareholders in APL less than one year after they were hired by the corporation. Each of the individual doctors were employed by APL under identical written employment contracts.

The employment contracts between the individual doctors and APL were of one year duration subject to annual renewal. These contracts provided for compensation in the form of a salary, contributions to pension and profit sharing plans, and a possible bonus. The By-Laws of APL provided that this bonus was to be awarded at the discretion of the directors. The doctors' contracts did not specify that a bonus would be paid, nor did the contract specify the amount of bonus or method of calculation.

From 1971 to the present, APL has awarded bonuses each year. APL's corporate records reflect the actions of the Board of Directors with respect to bonuses. Each pathologist did receive a bonus until the years 1980 and 1981.

APL did not award Dr. Collins a bonus in either 1980 or 1981. The directors of APL asked for and received Dr. Collins' resignation from APL, effective January 31, 1982. After leaving APL, Dr. Collins requested St. John's Hospital to hire him as a pathologist on an individual basis, but St. John's refused to do so. Dr. Collins has

maintained staff privileges at St. John's Hospital on a leave of absence of basis since 1982. He is currently employed as a pathologist at Humana Hospital in California.

APL's relationship with St. John's Hospital has been governed by successive contracts: the February 1, 1969 contract, the July 1, 1970 contract, the December 31, 1975 contract, and the October 1, 1983 contract. The first three of these contracts stated that APL would "provide complete and adequate professional pathology services" to St. John's Hospital, while the October 1, 1983 contract provides an expanded form of this language at paragraph 4 of the section, "Agreements of the Corporation." Each of the St. John's/APL contracts contain a provision allowing termination of the contract at any time upon 90 days notice, effective either immediately or after the first year of the contract.

The contracts of 1969, 1970 and 1975 do not contain any provision dealing with St. John's Hospital's right to hire additional pathologists or groups of pathologists. The October 1, 1983 written agreement authorizes in paragraph 5 of "Mutual Agreements" that "The Hospital may employ additional pathologists or groups of pathologists to perform services in pathology for the Hospital based on the needs of the Hospital, its medical staff, and patients. The Hospital may permit such persons to have the use of the Hospital facilities based on reasonable schedules and conditions."

St. John's and the other hospitals in Springfield draw their patients from the Springfield standard metropolitan statistical area (the "Springfield SMSA") which includes Springfield and the surrounding areas of Sangamon and

Menard Counties. In 1980, the United States Census showed the population of Springfield to be 187,789 people, most of whom reside in Springfield and the surrounding area of Sangamon County. The residents of the Springfield SMSA rely almost exclusively on the hospitals in Springfield. A statewide patient origin study prepared by the Illinois Hospital Association shows that in 1981 approximately 97.3% of all persons in Sangamon County who were hospitalized, and approximately 92.2% of all persons in Menard County who were hospitalized, received hospital care from one of the three hospitals in Springfield.

The Springfield hospitals, primarily St. John's and Memorial, also attract patients from other nearby counties. The patient origin study shows that 23% to 39% of the persons in Cass, Christian, Logan, Macoupin, Montgomery, Morgan and Scott Counties sought hospital care at one of the three hospitals in Springfield, Illinois. Generally, the patients from the City of Springfield and Sangamon, Menard, or Cass Counties receive the entire range of hospital care, whereas those patients at St. John's from surrounding counties are there for more specialized treatment. These specialized or tertiary care services include services provided by medical practitioners specializing in neurosurgery, nephrology, neonatalogy and the like. Such services are not available at the small hospitals in the area.

EXCLUSIVE DEALING CONTRACT

The Plaintiff's main antitrust claims are based upon § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. That section makes it unlawful for anyone to contract, combine in the form of a trust or otherwise, or conspire, in

restraint of trade or commerce among the several states. Based upon this section, the Plaintiff alleges that the contract between APL and St. John's Hospital is a combination in restraint of trade, an unlawful boycott, and an unlawful tying agreement. (Counts I and III).

The Plaintiff argues that the agreements entered into between St. John's Hospital and APL are unreasonable restraints of trade because they are exclusive contracts which require that any pathology work to be performed at St. John's Hospital must be performed by APL. The Plaintiff contends that because these agreements are exclusive, they have substantially foreclosed competition in the market of providing pathological services. Moreover, these agreements have foreclosed competition in an illegal manner because the exclusive contracts are neither reasonable nor necessary.

There does seem to be a factual issue with regard to whether the agreements between APL and St. John's are, in fact, exclusive. The Defendants argue that the word exclusive never appears in any of the St. John's/APL agreements, but the Plaintiff responds that over the years, the parties to the agreements have operated as if they were exclusive. The Court finds that even though such a factual dispute exists, it does not prevent the Court from entering summary judgment on this issue, because the factual dispute is not material to the Court's decision on this issue. Rather, the Court concludes that summary judgment in favor of the Defendants is appropriate because the agreements are not an unreasonable restraint of trade even if they operate as exclusive contracts.

Cases interpreting the Sherman Act make it clear that all exclusive contracts are not violations of the Sherman Act because they are not necessarily an unreasonable restraint of trade. The United States Supreme Court in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), established that a court must use a rule of reason approach to analyze an exclusive dealing contract and must determine the effect which the contract has upon competition in the relevant market place when deciding whether a contract has violated the Sherman Act.

In *Tampa Electric*, Tampa Electric Company entered into an agreement whereby Potter Towing Company and its successor to the contract, West Kentucky Coal Company, agreed to supply Tampa Electric's total requirement of coal for the operation of a coal-burning plant for 20 years. The lawsuit arose wheen the Coal Company informed Tampa Electric that the contract was illegal under the antitrust laws and it would not perform.

Even though the case involved application of § 3 of the Clayton Act, 15 U.S.C. § 14, the analysis used by the Court has been applied to other requirements contracts or exclusive-dealing cases. (The Court itself acknowledged that under its analysis, the contract did not violate § 1 and § 2 of the Sherman Act. *Id.* at 335). The Court began by pointing out that all exclusive-dealing arrangements are not unlawful, but only those that foreclose competition in a substantial share of the line of commerce affected. The threatened foreclosure must be in relation to the market affected, which involves determining the type of goods involved and the market area in which the seller operates and within which the purchaser can

practicably turn for supplies. The last step in this analysis is a determination of whether the competition foreclosed by the contract constitutes a substantial share of the relevant market, that is, whether the opportunities for other traders to enter into or remain in that market are significantly limited by the contract. 365 U.S. at 327-28.

In the *Tampa Electric* case, the Court decided that the relevant line of commerce was bituminous coal and compared the estimated amount of coal under the contract with the amount of coal produced and sold by the producers who could have also effectively competed for Tampa Electric's business. The Court found that even though the contract involved a large amount of coal and a significant dollar value, the purchase was quite insubstantial in terms of the total amount of coal produced in the relevant multi-state area. The Court acknowledged that the contract did pre-empt competition to a certain degree, but it did not substantially foreclose competition in the relevant coal market because of the amount of trade in coal which still existed in the relevant geographic area.

In the present case, the Plaintiff contends that the contracts in effect between St. John's Hospital and Associated Pathologists required that all pathology work done at St. John's Hospital and on St. John's patients was to be performed by doctors of APL. The Plaintiff argues that the relevant product market for the Court's inquiry is the provision of pathological services to patients and that the agreements foreclosed competition among pathologists to provide such services. To be more specific,

the exclusive agreements prevented patients at St. John's Hospital from having their pathology work done by anyone other than an APL doctor, and they prevented pathologists who were not APL members from offering his or her services to a patient at St. John's. The Plaintiff contends that the exclusive agreements had an adverse effect upon competition in the area of pathological services, because competition among pathologists would result in lower prices and/or increased quality of pathological work done for St. John's patients.

While the arguments advanced by the Plaintiff have some appeal, the Court believes that the focus of the Plaintiff's arguments are misdirected in the context of a claim that the exclusive dealing arrangement is an unfair restraint on competition. The Supreme Court in *Tampa Electric* analyzed the situation before it in terms of whether the requirements contract foreclosed coal producers from the opportunity to sell their product. The Court did not suggest that the inquiry should focus upon the impact on consumers who would be purchasing the electricity generated by the coal-purchasing electric company. Rather, in defining the relevant market, the Court looked to the location of coal companies who could have supplied Tampa Electric Company and concluded that the relevant market area was the area in which these coal companies did in fact compete for buyers of their coal. The *Tampa Electric* Court used this type of analysis to define the relevant marekt because the purpose of its antitrust inquiry into the exclusive requirements contract was to determine the extent to which the contract preempted or foreclosed competition in the sense that the

amount of coal under the contract was no longer a possible sale for competing coal producers.

In the present case, St. John's Hospital is in the position of Tampa Electric Company, and APL is situated similarly to the supplying coal companies, because the Hospital has agreed to use APL for whatever pathological services it needs. In determining whether this exclusive arrangement forecloses competition, then, the focus is upon competition from the point of view of whether other pathological jobs are available in the relevant market and how many such jobs are available in comparison with the number of job opportunities foreclosed by the arrangement between the Hospital and APL. This means that one must view the situation from the point of view of pathologists competing for work, rather than from the point of view of patients in the Hospital and the choices available (or foreclosed) to them when they need pathological services.

The Court finds support for this method of analyzing the present situation in the United States Supreme Court case of *Jefferson Parish Hospital District No. 2 v. Hyde,* 466 U.S. 2 (1984). The main focus of the Court's opinion in *Jefferson Parish* was upon the plaintiff's, Dr. Hyde's, claim that the exclusive arrangement between Jefferson Parish Hospital and a firm of anesthesiologists was an illegal tying arrangement because users of the hospital's operating rooms were compelled to purchase the hospital's

chosen anesthesia service rather than services provided by competing anesthesiologists.[1]

The Court in *Jefferson Parish* addressed the claim that the contract between the hospital and the anesthesiological firm violated the Sherman Act because it unreasonably restrained competition. The Court explained:

> "That burden necessarily involves an inquiry into the actual effect of the exclusive contract on competition among anesthesiologists. This competition takes place in a market that has not been defined. The market is not necessarily the same as the market in which hospitals compete in offering services to patients; it may encompass competition among anesthesiologists for exclusive contracts such as the Roux contract [the contract between the hospital and the anesthesiological firm] and might be statewide or merely local." 466 U.S. at 29.

The *Jefferson Parish* Court then went on to explain in a footnote:

> "The effect of the contract has, of course, been to remove the East Jefferson Hospital from the market open to Roux's competitors. Like any exclusive requirements contract, this contract could be unlawful if it foreclosed so much of the market from penetration by Roux's competitors as to unreasonably restrain competition in the affected market, the market for anesthesiological services." See generally *Tampa Electric Co. v. Nashville Coal Company*, 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed 580 (1961); *United States v. Standard Oil Co.*, 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949). 466 U.S. at 30 n. 51.

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1. The present case also presents a claim of an illegal tying arrangement, but that is a separate issue from the analysis of the exclusive arrangement between St. John's Hospital and APL, and the Court will discuss that issue in a later section.

The Court in *Jefferson Parish* reviewed the evidence presented at trial and concluded that there was insufficient evidence in the record to provide a basis for finding that the Roux contract, as it actually operated in the market, had unreasonably restrained competition

Even though the present case is before the Court on a Motion for Summary Judgment, the Court finds that the Plaintiff has not met his burden of showing that there is a genuine issue of material fact as to the anticompetitive effect of the exclusive contract in light of the Defendants' Motions for Summary Judgment. The Plaintiff has strenuously argued that the exclusive arrangement foreclosed patients at St. John's from choosing particular pathologists not associated with APL and likewise foreclosed pathologists not associated with APL from the opportunity to perform pathological services for patients at St. John's. However, as the Seventh Circuit suggested in the case of *Dos Santos v. Columbus*, 684 F.2d 1346 (7th Cir. 1982), another case involving an exclusive arrangement between a hospital and an anesthesiological firm:

> "Because the patient generally takes no part in the selection of a particular anesthesiologist (the surgeon makes the choice) . . . and because the expense of anesthesia services to the patient is ordinarily at least partially insured or otherwise payable by a third party, it might be somewhat anomalous to treat the patient as a buyer. . . . It may thus be more appropriate for antitrust purposes to treat the *hospital* as the purchaser, in view of the hospital's responsibility for assuring the availability of anesthesia services for its patients, its incentive to maximize the use of its surgical facilities, and its potential liability for negligent rendition of anesthesia services in its operating rooms. If the hospital rather than the individual patient is regarded as the purchaser, the relevant market could

> be defined as the area in which Associates [the anesthesiological firm] operates and in which the Medical Center (rather than the patient) can practicably turn for alternative provision of anesthesia services.'' 684 F.2d at 1354.

This Court believes that the Seventh Circuit accurately described the analysis which this Court should use in analyzing the anticompetitive effect of the exclusive arrangement between St. John's Hospital and APL, an approach which the Court described above in its citation to *Tampa Electric Company.* Under such an analysis, the Plaintiff has failed to present any evidence of what the relevant market would be, and the only evidence in the record is that a nationwide market exists for hospitals to hire pathologists (and for pathologists to seek employment with hospitals). This conclusion is supported by the fact that most of the doctors employed by APL during the years in question were from out of state, including Dr. Collins, who originally came to Springfield from New York. Furthermore, in seeking new employment after his employment with APL was terminated, Dr. Collins' search extended far beyond Springfield and even Illinois, because he eventually obtained a job in California.

What this means is that even though pathologists (such as Dr. Collins) not associated with APL are foreclosed from practicing at St. John's Hospital, there still exists many opportunities in hospitals nationwide to pursue a career elsewhere. The real market by which the Court must assess the anticompetitive effect of this exclusive arrangement is the market hospitals look to in hiring pathologists, and the Plaintiff has failed to show that this market is anything but nationwide.

The Court notes that a pathologist may indeed be foreclosed from pursuing a career in pathology in Springfield, Illinois because of the exclusive arrangement between St. John's Hospital and APL. However, the Court believes that to conclude from this that the defendants violated § 1 of the Sherman Antitrust Act involves viewing the present situation too narrowly. Following this line of thinking, any contract between two parties would become an unlawful exclusive arrangement because it would have the effect of foreclosing competition for that particular business.

Dr. Collins' claim that the exclusive arrangement between St. John's and APL has foreclosed him from practicing pathology in Springfield is really no different from the hypothetical claim that he would have been foreclosed from competition in Springfield if St. John's hired pathologists individually and had refused to hire Dr. Collins because the Hospital had a full complement of pathologists and did not have an opening for him. Dr. Collins claims that he has been prevented from practicing pathology in Springfield, and yet he has not made Memorial Hospital a party to this lawsuit, even though each of the individual contracts which Memorial has entered into with its pathologists has prevented him from filling a position on Memorial's staff. Because a substantial number of other opportunities are still available to Dr. Collins (and other pathologists) for practicing pathology (even though not necessarily in Springfield) despite the exclusive arrangement between St. John's and APL, the Court finds that there is no genuine issue of material fact in dispute regarding the effect of the agreement on competition. The Court grants summary judgment in favor of the Defendant

on the Plaintiff's claims under § 1 of the Sherman Act, which allege a combination or contract in restraint of trade.

The Court adds that Dr. Collins has not raised any issue of fact with regard to his ability to put together his own group of pathologists that could compete for the contract which St. John's Hospital has with APL. The exclusive arrangement that APL has with St. John's Hospital was terminable by either party on 90 days notice, which suggests that St. John's can cancel the contract if another pathological service makes a better bid (in terms of prices and/or quality of services) to supply the package of pathological services which APL supplies. This approach indeed involves competition, not at the level of each individual lab test that must be performed for a patient, nor at the level of competition among individual pathologists for one or more job openings available at a hospital. This competition, rather, involves the right to provide the Hospital with the entire package of pathological services which the Hospital (because of its patients) requires. The Court is not aware of any evidence which would suggest that competition at this level is necessarily detrimental to consumers, whether one regards those consumers as the Hospital or the patients themselves.

The mere fact that one aspiring competitor has been refused a job does not entitle him to a remedy under the antitrust laws, because the antitrust laws are designed to protect competition, not competitors. *Brown Shoe Co. v. United States,* 370 U.S. 294, 320 (1962). The materials presented in support and in opposition to the Defendants' Motions for Summary Judgment show that this exclusive arrangement has not foreclosed competition among path-

ologists for work opportunities in the relevant hiring market, and the Court orders that summary judgment is granted for the Defendants on the Plaintiffs § 1 claim of an unreasonable restraint on competition.

BOYCOTT

In his memorandum in response to the Defendants' Motions for Summary Judgment, the Plaintiff for the first time argues that the exclusive agreement between APL and St. John's Hospital constitutes an illegal boycott which violates § 1 of the Antitrust Act. The complaint does not specifically allege that the doctors and the Hospital engaged in an illegal boycott, but Count I does allege that the Defendants engaged in a combination in restraint of trade, and such language is broad enough to encompass the idea of an illegal boycott. The Plaintiff argues, however, that boycotts are illegal *per se* under the antitrust laws. According to the Plaintiff, if the Court is to grant summary judgment, it ought to grant summary judgment in favor of the Plaintiff, because there is no dispute but that such an illegal boycott or concerted refusal does exist.

The law with regard to illegal boycotts is somewhat unclear, because of the general language used in some older Supreme Court cases which suggests that all boycotts are illegal *per se*. For example, in the case of *United States v. General Motors*, 384 U.S. 127, 145 (1964), the Court stated, "There can be no doubt that the effect of the combination or conspiracy here was to restrain trade and commerce within the meaning of the Sherman Act. Elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the Act." The Court then went on to say:

> "[W]here businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct. (Citation omitted). Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins or their system for distributing automobiles, any more than by reference to the allegedly tortious conduct against which a combination or conspiracy may directed—as in *Fashion Originators' Guild of America, Inc. v. Federal Trade Commission*, 312 U.S. 457, 468 (1941)." *Id.* at 146-47.

Such language, argues the Plaintiff, is applicable to the instant case because the facts clearly establish that the members of APL exerted pressure upon St. John's Hospital in order to induce the Hospital not to hire Dr. Collins after APL had terminated his employment with them. According to this reasoning, because the Court is to apply the *per se* standard of illegality to these actions, there can be no dispute but that the Defendants violated the §1 of the Sherman Antitrust Act.

More recently, the Seventh Circuit has explained its own understanding of illegal boycotts in cases such as *U.S. Trotting Association v. Chicago Down Association, Inc.*, 665 F.2d 781 (7th Cir. 1981). In *U.S. Trotting*, the Court began its discussion of the plaintiff's antitrust claims by stating that the rule of reason is the standard traditionally applied for the majority of anticompetitive practices challenged under § 1 of the Sherman Act. However, a particular course of conduct will be termed a *per se* violation of the Act after courts have had considerable experience

with the type of conduct challenged and application of the rule of reason has inevitably resulted in a finding of anti-competitive effects. 665 F.2d at 787-88. The court explained that the Supreme Court has found certain group boycotts illegal *per se,* but that a *per se* rule had never been applied by the Supreme Court to concerted refusals to deal which were not designed to drive out competitiors. The Court then went on to say that it would analyze the group activity alleged in the case before it under a rule of reason standard rather than a *per se* rule. *Id.* at 788.

Elaborating on this further in the case of *Marrese v. American Academy of Orthopaedic Surgeons,* 706 F.2d 1488 (7th Cir. 1983), *vacated on other grounds,* 726 F.2d 1150 (7th Cir. 1984), *rev'd,* — U.S. —, 105 S.Ct. 1327 (1985), the Seventh Circuit set forth a general statement of the law of boycotts: "[B]oycotts are illegal per se only if they are used to enforce agreements that are themselves illegal per se—for example price-fixing agreements." 706 F.2d at 1495. The Court explained that the antitrust laws are concerned with the welfare of consumers rather than individual competitors, and it is only with this orientation in mind that a court can decide whether a boycott should be viewed as *per se* illegal. Moreover, the Seventh Circuit stated in *Wilk v. American Medical Association,* 719 F.2d 207, 221 (7th Cir. 1983), when a conspiracy is alleged in the context of a profession and the evidence shows that the purpose of the conspiracy is not to compel doctors to engage in certain economic behavior vis-a-vis consumers, such as price fixing, then the nature and extent of the anticompetitive effects of the boycott are too uncertain to be amenable to *per se* treatment, as contrasted with treatment under the rule of reasons.

The Plaintiff cites the Third Circuit case of *Weiss v. York Hospital,* 745 F.2d 786 (3rd Cir. 1984), for the proposition that a boycott, even involving the medical profession, should be analyzed under a *per se* rule of illegality. However, as the court in *Weiss* clearly explained, that case involved allegations that a hospital and its medical staff acted to exclude all osteopathic physicians (D.O.s) from its staff without considering each osteopath's application for staff privileges on a case-by-case basis. The court concluded that the case could be viewed as an example of a concerted refusal to deal or a boycott because the medical doctors (M.D.s) who staffed the hospital were the equivalent of retailers who had banded together to cause the hospital (the equivalent of a manufacturer) to exclude their competitors, the D.O.s. 745 F.2d at 819.

The court explained that because the M.D.s controlled the hospital's admission decisions, the case was similar to the situation where a group of firms at one level of distribution, the doctors' level, had used their existing relationship with a supplier to exclude their competitors from dealing with the supplier. The court, however, acknowledged that the facts of the case did not precisely fit into the mold of a classical refusal to deal because of its similarity to a discrimination case against all osteopaths. *Id.* at 819-20. The court added that the Medical Staff was entitled to exclude individual doctors, whether M.D.s or O.D.s, on the basis of their lack of professional competence or other unprofessional conduct. *Id.* at 820. However, the Third Circuit chose to apply a *per se* rule to the alleged boycott because the complaint contained allegations that the hospital applied two different standards when reviewing applications for privileges from M.D.s and D.O.s. The Court elaborated on this idea in a footnote, explaining that

because of a hospital's "public service" function, a hospital's decision to restrict staff privileges on the basis of medical ability or professional conduct can be "pro-competitive action" and would be analyzed under a rule of reason. *Id.* at 820-21 n. 60.

The Court believes that under the facts of the present case, the Plaintiff's allegation of a group boycott or concerted refusal to deal under § 1 of the Sherman Act (if indeed such a theory can be read into the complaint) must be analyzed under the rule of reason and is not a *per se* violation. This case is different from *Weiss* because there was no combination of firms or competitors on the distribution level which could have put pressure on the supplier (hospital) level; all of the individual Defendants were members of the same business, APL, and only that single business could have tried to apply pressure to St. John's. Moreover, the Plaintiff does not allege that he is part of a group that has been discriminated against by means of a different standard for judging professional competence. Rather, this case is similar to that type described in the footnote, in which hospitals have refused to grant staff privileges pursuant to their "public service" function. Under such an analysis, not only does the Plaintiff have the burden of proving that the Defendants did indeed engage in illegal antitrust activities, but the Plaintiff must also show that the activities had an anticompetitive effect upon the relevant market that could not be justified by whatever pro-competitive effects might result from the activities.

Applying this standard to the Defendants' Motions for Summary Judgment, the Court finds that there is no genuine issue of material fact regarding the Plaintiff's

claim of an illegal group boycott, and the Court orders that the Defendants' Motions for Summary Judgment are granted.

In the case of *Monsanto Company v. Spray-Rite Service Corporation,* 465 U.S. 752 (1984), the Supreme Court dealt with the issue of the standard of proof required to find a vertical price-fixing conspiracy in violation of § 1 of the Sherman Act. In *Monsanto,* Spray-Rite had claimed that Monsanto terminated its distributorship as part of a price-fixing conspiracy among Monsanto and its other distributors. Even though the Court did not actually discuss the case in terms of a group boycott or concerted refusal to deal, the issue arose of whether Monsanto had acted unilaterally or in concert with the other defendants when it terminated Spray-Rite's distributorship. The Court held that evidence that Monsanto had received complaints from other dealers was insufficient to support a finding that there had been concerted action among the dealers and Monsanto. The standard as enunciated by the Supreme Court is: "There must be evidence that tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently," thus putting the burden on the plaintiff to present evidence that would foreclose the possibility of independent action. 465 U.S. at 767.

This same standard is applicable to the facts of the case before the Court, because the Plaintiff alleges that the Defendants conspired to prevent St. John's Hospital from hiring the Plaintiff. The Defendants, on the other hand, argue that the Hospital had the right to make its own decision and did, in fact, make its own independent

decision regarding whether to hire Dr. Collins after APL had terminated his employment. The Court believes that the Plaintiff has not met his burden of presenting evidence that would preclude entry of a directed verdict in favor of the Defendants under the standard announced by the Supreme Court in *Monsanto* for concerted action under § 1 of the Sherman Act.

The Plaintiff has suggested that APL used its influence to cause the Hospital to refrain from hiring Dr. Collins, but the only evidence presented on this issue was that Theodore Druhot, Executive Vice President of St. John's had discussions with the members of APL prior to telling Dr. Collins that he would not hire him with an independent contract. This is not the type of evidence which excludes the possibility of independent action, because the Hospital had the right to make an administrative decision not to hire Dr. Collins. St. John's Hospital had the right to hire or not hire Dr. Collins as an independent pathologist, based upon its perceived need for pathologists in addition to those working for APL. To suggest that APL used its influence to cause St. John's Hospital to reach this decision is merely to suggest that APL wanted St. John's to abide by the terms of its contract with APL, in which the Hospital agreed that APL would provide complete and adequate professional pathology services.

As the Court explained in the previous section of this Order, the "exclusive" agreement between the Hospital and APL is not a restraint of trade in violation of the Sherman Act. Thus, the Court cannot conclude otherwise but that the Hospital did not violate antitrust laws when

it chose to abide by the terms of the agreement and not hire Dr. Collins as an additional pathologist. Any contract can be characterized as an exclusive agreement to deal with a particular entity and not deal with others depending upon the scale at which it is viewed; this does not mean that every contract is an illegal boycott or concerted refusal to deal between the contracting parties merely because others are foreclosed from competing for that same business. Therefore, with regard to the Plaintiff's claims under § 1 that the Defendant engaged in a boycott that should be judged *per se* illegal, the Court finds that the rule of reason is the applicable standard and orders that the Defendants' Motions for Summary Judgment are granted.

ILLEGAL TYING

In Count III of the complaint, the Plaintiff makes a claim that the contract between APL and St. John's Hospital resulted in an unlawful tying arrangement that violated § 1 of the Sherman Act. Generally, a claim for unlawful tying involves a seller, who has market power in a particular product or service, who requires buyers of that product or service to also purchase a second and separate product or service (the tied product) as a condition of their original purchase. As courts have explained, the problem with tying arrangements is that they allow a seller with market power in one product to impair competition on the merits in another market, forcing consumers to make a purchasing decision based on other than competitive pressures in the market for the tied product. In this case, the Plaintiff alleges that the Hospital, having market power in the provision of hospital rooms and fa-

cilities, has used the exclusive arrangement with APL to force patients to purchase pathological services from APL physicians. The Plaintiff claims that this is an unlawful tying arrangement because the effect is to stifle competition among the providers of pathological services.

A recent United States Supreme Court case has discussed this type of tying claim in the context of the medical profession and an agreement between a hospital and a group of doctors. In *Jefferson Parish Hospital District No. 2 v. Hyde,* 466 U.S. 2 (1984), the Supreme Court held that the contractual arrangement between the hospital and a firm that supplied anesthesiological services was not an unlawful tying arrangement because the plaintiff could not show that the hospital had sufficient market power to force patients to purchase anesthesiological services from the hospital's anesthesiological group. The Court found that the provision of anesthesiological services and other hospital services involved two separate products, but the defendant hospital did not have a dominant or even substantial share of the market for patients in the relevant market area. This meant that patients who preferred not to use the services of the hospital's anesthesiological firm could go to a competing hospital and use the services of another anesthesologist.

The Plaintiff in the present case argues that he has made out a good claim of an unlawful tying arrangement based upon the analysis of *Jefferson Parish,* because St. John's Hospital has at least an equal, if not dominant, market position with the other hospital in Springfield that provides tertiary care to its patients. Under these facts, the Plaintiff argues that not only is the tying ar-

rangement illegal, but it is illegal *per se* and there is no need for the Court to inquire into the actual market effects of the tying arrangement.

The Court does not feel it would be proper to scrutinize this alleged tying arrangement under a *per se* rule rather than a rule of reason. Although the Plaintiff is correct in citing numerous cases for the proposition that tying arrangements are illegal *per se,* the Supreme Court in *Jefferson Parish* seemed to substantially "soften" this position in its analysis of the alleged tying arrangement which it was reviewing. The Court said:

> "*Per se* condemnation—condemnation without inquiry into actual market conditions—is only appropriate if the existence of forcing is probable. (Footnote omitted). Thus, application of the *per se* rule focuses on the probability of anticompetitive consequences. Of course, as a threshold matter there must be a substantial potential for impact on competition in order to justify *per se* condemnation. 466 U.S. at 15-16.
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> [A]ny inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact. Thus, in this case our analysis of the tying issue must focus on the hospital's sale of services to its patients, rather than its contractual arrangements with the providers of anesthesiological services. In making that analysis we must consider whether petitioners are selling two separate products that may be tied together, and, if so, whether they have used their market power to force their patients to accept the tying arrangement." *Id.* at 18.

The Court reads this language as a modification of the strict *per se* rule which courts have used in antitrust

cases dealing with price-fixing. As the concurring opinion of Justice O'Connor, joined in by three other Justices, says:

> "Some of our earlier cases did indeed declare that tying arrangements serve 'hardly any purpose beyond the suppression of competition.' *Standard Oil Co. of California v. United States,* 337 U.S. 293, 305-306, 69 S.Ct. 1051, 1058, 93 L.Ed. 1371 (1949) (dictum). However, this declaration was not taken literally even by the cases that purported to rely upon it. In practice, a tie has been illegal only if the seller is shown to have 'sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . .' *Northern Pacific R. Co. v. United States,* 356 U.S. 1, 6, 78 S.Ct. 514, 518, 2 L.Ed. 545 (1958)." 466 U.S. at 34.

Justice O'Connor explained, "[T]he *per se* label in the tying context has generated more confusion than coherent law because it appears to invite lower courts to omit the analysis of economic circumstances of the tie that has always been a necessary element of tying analysis." *Id.* at 34-35. The concurring Justices concluded that the *per se* rule should be applied only in those few instances where a horizontal or quasi-horizontal restraint has no economic justification whatsoever, and most tying arrangements should be analyzed under the rule of reason, with an inquiry into the adverse economic effects and the potential economic benefits that the tying arrangement would have. *Id.*

Regardless of how courts in the future will characterize their approach to tying cases, the Court believes that this issue can be resolved at an earlier stage in the

analysis. The Supreme Court in *Jefferson Parish* stated that the Court must consider whether two separate products are in fact being tied together, and this Court concludes that as a matter of law the Plaintiff has not stated a claim for an unlawful tying arrangement because the provision of hospital services and pathological services are not two separate and distinct products.

The Supreme Court in *Jefferson Parish* said that the analysis of whether one or two products are involved in an alleged tying scheme "turns not on the functional relation between them, but rather *on the character of the demand for the two items.*" (Emphasis added). 466 U.S. at 19. On the specific facts of the case before it, the Supreme Court said, "[N]o tying arrangement can exist unless there is a sufficient demand for the purchase of anesthesiological services separate from hospital services to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services." *Id.* 21-22. The Court then held that there was ample evidence that anesthesiological services and other hospital services provided by the defendant hospital were distinct and separate products, based upon the fact that patients or surgeons often requested specific anesthesiologists. The Court found that the choice of an individual anesthesiologist was particularly frequent in the plaintiff's specialty of obstetric anesthesiology, and a surgeon normally selects an anesthesiologist based on his familiarity with that anesthesiologist gained through a working relationship.

On these same facts, however, the four concurring Supreme Court Justices concluded that there was no sound

economic reason for treating surgery and anesthesia as separate services, because patients are interested in purchasing anesthesia only in conjunction with hospital services. Furthermore, the hospital could acquire no additional market power by selling the two services together. According to the concurring Justices, "[T]he link between the hospital's services and anesthesia administered by Roux will affect neither the amount of anesthesia provided nor the combined price of anesthesia and surgery for those who choose to become the hospital's patients. In these circumstances, anesthesia and surgical services should not be characterized as distinct products for tying purposes." *Id.* at 43.

The Court finds that there are enough factual distinctions between *Jefferson Parish* and the present case to conclude as a matter of law that the provision of pathological services is not a separate product from the other services routinely offered by a hospital. The evidence presented along with the motions for summary judgment and the Plaintiff's opposition show that the vast majority of work performed by pathologists involve laboratory tests and analyses that require the pathologist to rely a great deal upon the hospital's physical facilities and equipment. Thus, it is easy to see the pathologist as similar to an employee of the hospital rather than an independent contractor hired by the hospital for each specific task he must perform. The evidence shows that there is some demand for pathological services on an out-patient basis, not in connection with the provision of other hospital services, but the number of such requests are insubstantial when compared to the amount of pathological

work done for hospital-based patients. In addition, the work of a pathologist is laboratory based, so there is not the close, face-to-face contact between the physician and the patient as there is in the practice of anesthesiology. Finally, the evidence is overwhelming that patients never request specific pathologists, and it is only on rare occasions that physicians themselves request the services of a specific pathologist. After reviewing all of this evidence, the Court finds there is no genuine issue of material fact and concludes that pathological services cannot be viewed as a separate and distinct product from the facilities and other services which a hospital provides for its patients.

The Court points out that from the perspective of the patient receiving the benefit of the pathological services (or the patient's doctor requesting that certain pathological tests be performed), the St. John's/APL agreement, in effect, resembles the situation where a hospital has hired a specific number of pathologists on an individual basis to perform pathology work for the hospital. The Plaintiff has submitted no evidence that it is the routine practice of hospitals to grant staff privileges to large numbers of pathologists, as is done with other types of physicians, so that these physicians can have their patients admitted into a hospital and receive treatment without changing physicians. If a hospital hires four pathologists by means of individual contracts, or purchases the services of a pathology group that provides the hospital with four pathologists, patients in that hospital (and doctors with patients in that hospital) have four pathologists from which to choose for their pathology work. In either scenario, the patients or their doctors

have four (but only four) pathologists from which to choose, if, in fact, the patient or doctor is so inclined and well-enough informed to even make a choice about his pathologist.

Because pathologists are recognized as having a hospital-based practice rather than a practice oriented toward obtaining individual patients, the Court finds that pathological services are just one of the many services provided by a hospital for the care of its patients. The Plaintiff's claim of an unlawful tying arrangement between the Defendant Hospital and APL must fail on these Motions for Summary Judgment, because there are not separate and distinct products involved.

MONOPOLIZATION AND ATTEMPT TO MONOPOLIZE

The final federal antitrust claim which the Plaintiff brings is a claim against APL and the individual doctors of APL that the agreement between St. John's Hospital and APL violated § 2 of the Sherman Act, 15 U.S.C. § 2. Section 2 makes it unlawful for any person to monopolize, attempt to monopolize, or combine or conspire with any other person to monopolize any part of the trade or commerce among the several states. The Court has some difficulty in understanding the Plaintiff's claim of monopolization, but it appears that the complaint alleges that the APL Defendants monopolized or attempted to monopolize the provision of pathological services at St. John's Hospital and in the Springfield area by means of the St. John's/APL agreement.

In order to maintain a claim for monopolization or attempted monopolization in violation of § 2, a plaintiff

must allege and prove that a defendant possesses monopoly power in the relevant market and the Defendant willfully acquired or maintained that power, as distinguished from growth or development as a consequence of a superior product, business acument, or historic accident. *United States v. Grinnell Corp.,* 384 U.S. 563, 570-571 (1966). Monopoly power consists of "the power to control prices or exclude competition." Id. at 571. A claim for attempted monopolization is made out by a plaintiff who can show and prove that a competitor, with a "dangerous probability of success," engages in anticompetitive practices with the specific intent to build a monopoly or exclude or destroy competition. *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 626 (1952). Finally, the essential elements of a conspiracy to monopolize are: an agreement or understanding between two or more economic entities; a specific intent to monopolize; and the commission of an overt act in furtherance of the alleged conspiracy. *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 709-10 (1962).

In the complaint, the Plaintiff alleges that the relevant product market by which these § 2 claims are to be measured is the market for pathological services provided by licensed pathologists. The Plaintiff alleges that the relevant geographic market can be considered on two levels: the Springfield area, and the patients at St. John's Hospital who require pathological services. The Plaintiff alleges that the agreement between St. John's and APL is an unlawful monopolization, attempted monopolization, and conspiracy to monopolize and maintain a monopoly because the APL Defendants have used the agreement to maintain their status as the sole supplier

of pathological services to patients at St. John's and as a supplier of a substantial portion of the pathological services to patients in the Springfield area.

From this Court's previous discussions regarding the other antitrust claims, it follows that the Plaintiff's § 2 claims must also fail. The Court has already described its conclusion that the provision of pathological services is not a separate "product" or "service" from the other services provided by a hospital in caring for its patients. It would be anomalous, therefore, for the Court to say that even though pathological services did not constitute a separate product for purposes of a tying analysis, it did constitute a separate product market for purposes of a monopolization analysis. Because the Court finds as a matter of law that there is no relevant product market consisting of providing pathological services to individual patients, the Plaintiff must necessarily fail in his attempts to allege monopolization with regard to this product market.

Moreover, the Court belives that the Plaintiff is slicing the geographical market much too thin in arguing that the ALP Defendants have monopolized or attempted to monopolize the market for pathological services at St. John's Hospital. The definition of a relevant geographic market varies from case to case depending on the type of product and the geographical characteristics of an area, but the relevant geographic market must identify the area of effective competition that the defendant encounters when it offers its product or services for sale. *See, Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961).

In the present case, even though patients in St. John's Hospital do not have the choice of having doctors other

than those from APL perform pathological work, they do have a choice prior to entering the hospital about which hospital they will enter based upon factors such as price, quality, the type of services, and the staff members (including pathologists) of the hospitals in the relevant geographic market. Therefore, it is incorrect to say that the patients in St. John's Hospital constitute a relevant geographic submarket for the provision of pathological services, when in fact they have a choice with regard to pathological services at the time they choose the particular hospital they will enter. The Court finds support for this view in the case of *Dos Santos v. Columbus-Cuneo-Cabrini Medical Center,* 684 F.2d 1346 (7th Cir. 1982), where the Seventh Circuit, in discussing an exclusive contract involving Columbus Hospital and a firm of anesthesiologists said, "[W]e have reason to doubt whether the relevant market can be sliced so small as to embrace only a single hospital." 684 F.2d at 1353.

Finally, the Court finds that the Plaintiff cannot state a claim against the APL Defendants for monopolization or attempted monopolization of the Springfield market for pathological services, because the agreement between St. John's Hospital and APL involves the provision of pathological services to only St. John's Hospital. Consequently, the portion of the market for pathological services which APL can maintain or acquire is inextricably linked to the portion of the market for patients that St. John's Hospital serves. The APL Defendants cannot possibly maintain its current share or acquire a greater number of Springfield patients by means of the agreement in dispute here unless St. John's Hospital itself maintains its current market share or acquires a

greater proportion of patients (specifically patients who require pathological services) in the Springfield area. Therefore, the Plaintiff cannot possibly bring a claim for monopolization or attempted monopolization of the Springfield market against the APL Defendants unless he also alleges that St. John's Hospital is engaged in illegal monopolization or attempted monopolization.

The Plaintiff has not made such allegations, and, in fact, in his brief in opposition to the motions for summary judgment, the Plaintiff admits that he has not alleged that St. John's has monopolized or attempted to monopolize any market. Furthermore, the evidence before the Court does not raise any genuine isssue of fact regarding an attempt by St. John's Hospital to monopolize or to willfully maintain monopoly power over the patient market in the Springfield area. Because the agreement between the Hospital and APL links the amount of APL's business with the number of patients treated by the Hospital, the Plaintiff cannot, as a matter of law, bring a claim of alleged monopolization or attempted monopolization against the APL Defendants without showing some type of effort at illegal monopolization on the part of St. John's Hospital as well. For all of the above reasons, the Court orders that the Defendants' Motions for Summary Judgment with regard to the § 2 monopolization claims of Count II is granted.

ANTITRUST CLAIMS UNDER THE ILLINOIS ANTITRUST LAW

Relying on the factual allegations mde out in Counts I, II, and III of his complaint, the Plaintiff also claims in Counts IV, V, and VI that the actions of the Defendants

violated the Illinois Antitrust Act, Ill.Rev.Stat. ch. 38, § 60-3. Specifically, Count IV of the complaint realleges paragraphs of Count I of the complaint and claims that the Defendants combined and conspired to restrain commerce unreasonably in violation of § 60-3(2) of the Illinois Antitrust Act. Count V is a claim against the Defendants for unlawful monopolization and attempted monopolization, similar to Count II of the complaint, in violation of § 60-3(3) of the Illinois Antitrust Act. Finally, the Plaintiff relies upon Count III of the complaint to allege in Count VI that the Defendants engaged in an unlawful tying arrangement in violation of § 60-3(4) of the Illinois Antitrust Act.

The language of the relevant provisions of § 60-3 of the Illinois Antitrust Act is substantially similar to the language used in the federal antitrust laws. In particular, the langauge of § 60-3(2) closely tracks the language of § 1 of the Sherman Act, and § 60-3(3) is very similar to § 2 of the Sherman Antitrust Act. The Illinois Antitrust Act concludes with § 60-11, which reads:

> "When the language of this Act is the same or similar to the language of a Federal Antitrust Law, the courts of this state in construing this Act shall follow the construction given to the Federal Law by the Federal Courts."

Based upon this statutory language, the Court believes that the analysis it used earlier in this opinion to grant the Motions for Summary Judgment in favor of the Defendants on the combination in restraint of trade and monopolization/attempted monopolization claims is fully applicable under the Illinois Antitrust Statute. Therefore, the Court orders that the Defendants' Motions for Summary

Judgment is granted with regard to Counts IV and V of the complaint.

The Court has had more difficulty in reaching a decision regarding the Plaintiff's claim under § 60-3(4) of the Illinois Antitrust Act (Count VI), because it is not exactly clear what standard the Court should use in assessing the allegations made in Count VI. In the case of *People ex rel. Scott v. Schwulst Building Center, Inc.*, 89 Ill.2d 365, 432 N.E.2d 855, 59 Ill.Dec. 911 (1982), the Illinois Supreme Court concluded that § 60-3(4) of the Illinois Antitrust Act should be construed as requiring application of a *per se* rule. The court reached this conclusion by finding that the provisions of the Illinois Act which use a rule of reason standard contain "reasonableness" language, and § 60-3(4) is patterned after § 3 of the Clayton Act, which, the court concluded, uses a *per se* analysis. If the Court were to accept this explanation on its face, then the Court would have to analyze the Plaintiff's claims in Count VI under a *per se* rule rather than the rule of reason analysis relied upon in earlier sections of this opinion.

The Court, however, is not convinced that it must undertake a different line of analysis which applies a *per se* standard in evaluating the Plaintiff's claims under § 60-3(4) of the Illinois Antitrust Act. First, § 60-3(4) involves two separate categories of antitrust claims: exclusive dealing arrangements and unlawful tying arrangements. Even though Count VI of the complaint is captioned as a claim for an unlawful tying arrangement, the Plaintiff argues in his briefs that the complaint states a cause of action for an exclusive dealing contract under § 60-3(4) of the Illinois Antitrust Act. Even though the

Plaintiff should have made it more clear in his complaint that he was bringing a complaint for an illegal exclusive dealing contract, the Court will analyze his claims under § 60-3(4) in terms of both of these types of antitrust violations.

Second, the Court believes that the Illinois Supreme Court overstated the legal conclusions which led it to hold that § 60-3(4) involved a *per se* analysis rather than a rule of reason standard in *Schwulst Building*. As this Court has pointed out, § 3(4) involves claims for both exclusive dealing contracts and tying arrangements, but the Illinois Supreme Court discussed § 3(4) only in terms of tying arrangements because the case before it involved a claim of an unlawful tying arrangement. This Court has already stated its position earlier in this opinion regarding whether courts should analyze tying arrangements under a *per se* rule or a rule of reason. Although older cases seem to suggest that tying arrangements are illegal *per se*, more recent decisions of the court have seemed to soften this approach by requiring some degree of analysis of market factors and the effect of the arrangement upon the market. *See, Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984).

Not only did the Illinois Supreme Court not distinguish between tying arrangements and exclusive contracts for purposes of establishing a standard under § 3(4) of the Illinois Antitrust Act, but the Court's decision was couched in rather conclusory terms. The Illinois Supreme Court correctly observed that § 3(4) is patterned after § 3

of the Clayton Act, 15 U.S.C. § 14[2] and cited three United States Supreme Court cases for the proposition that a *per se* test is applied to allegations involving § 3 of the Clayton Act.

The Seventh Circuit in *Roland Machinery Co. v. Dresser Industries,* 749 F.2d 380, 393 (7th Cir. 1984), analyzed one of those cases, *Standard Oil Co. v. United States,* 337 U.S. 293 (1949), in light of more recent cases discussing exclusive-dealing contracts such as *Jefferson Parish Hospital* and *Tampa Electric Co. v. Nashville Coal Company,* 365 U.S. 320 (1961). Based on its reading of these cases, the Seventh Circuit concluded:

> "[I]t now appears most unlikely that such [exclusive-dealing] agreements whether challenged under Section 3 of the Clayton Act or Section 1 of the Sherman Act, will be judged by the simple and strict test of *Standard Stations* [*Standard Oil Co. v. United States,* 337 U.S. 293 (1949)]. They will be judged under the Rule of Reason, and thus condemned only if found to restrain trade unreasonably." 749 F.2d at 393.

The Seventh Circuit had reached a similar conclusion in *Lupia v. Stella D'Oro Biscuit Co., Inc.,* 586 F.2d 1163 (7th Cir. 1978), another case involving the Court's analysis of § 3 of the Clayton Act and § 1 of the Sherman Act. In *Lupia,* the Seventh Circuit stated:

> "[C]ourts have held that agreements with manufacturers that limit distributors' sales to products made by the manufacturer are not *per se* violations of anti-

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2. The Clayton Act applies only to goods, whereas the Illinois Antitrust Act includes the word "services." Therefore, the Illinois Act applies to the provision of services as well as the sale of goods.

> trust law. Such an agreement is barred by section 3 of the Clayton Act only if its effect 'may be to substantially lessen competition or tend to create a monopoly in a line of commerce.' " 586 F.2d at 1172.

The Court indicated that a plaintiff "must allege some facts to demonstrate that defendant's marketing practices foreclosed competitors of the defendant from a substantial market." The Court affirmed the lower court's grant of summary judgment in favor of the defendant on the grounds that the plaintiff did not raise any isse of fact indicating that the defendant's anticompetitive practices caused injury to the plaintiff's competitive position in the relevant market. *Id.* at 1173.

In light of the recent developments in federal antitrust law, as explained by the Seventh Circuit and the United States Supreme Court, the Court believes that the Illinois Supreme Court's discussion of federal law in *Schwulst Building* is not completely accurate. Because the Court's conclusion in *Schwulst Building* purports to rely upon the incorrect interpretation of federal law, the Court does not believe it is bound to apply the literal holding of *Schwulst Building* that § 3(4) involves a *per se* analysis.

While the Illinois Supreme Court is at liberty to construe Illinois statutes differently than federal statutes using similar language, the Illinois Act itself instructs state courts to construe the Illinois Act in a manner consistent with federal antitrust laws when the statutory language of the two antitrust schemes are the same or similar. Consistent with this mandate and the most recent explanations of federal antitrust law given by the federal courts, this Court believes it is appropriate to analyze the § 3(4) claims, at least as they pertain to an exclusive deal-

ing contract, under a rule of reason approach. The Court finds that its earlier analysis of the exclusive dealing contract under § 1 of the Sherman Act and the Supreme Court decision in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961) is equally applicable to the Illinois Antitrust claim.

Moreover, regardless of whether Illinois courts would continue to apply a *per se* test in the area of tying arrangements (as was done by the court in *Schwulst Building)*, the Court finds that the Plaintiff has failed to raise a genuine issue of material fact with regard to his unlawful tying claim under § 3(4) of the Illinois Antitrust Act. The Court holds as a matter of law that the provision of pathological services is not separate and distinct from the provision of hospital services, and where there does not exist two separate products (or services), there can be no claim for an unlawful tying arrangement. The Court orders that the Defendant's Motions for Summary Judgment with regard to Count VI of the Complaint are granted.

BREACH OF CONTRACT

Count VII of the complaint is a contract claim in which Dr. Collins alleges that APL breached the employment contract between APL and Dr. Collins by refusing to pay him a bonus in the years 1980 and 1981.[3] The Defendants take the position that the contract between Dr. Collins and APL which governed the years 1980 and 1981 did not provide that a bonus would be paid to any member of

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3. Dr. Collins did receive bonuses for the years during which he was employed by APL prior to 1980, so the Court understands that he is challenging the Defendants' actions under only the 1977 Employment Agreement.

APL, but rather, permitted bonuses to be paid in the discretion of the directors of APL. The Defendants argue that the contractual language is unambiguous and leads to the conclusion the contract established only a mere expectancy of a bonus and did not require APL to make such payments.

Dr. Collins argues that because the employment contract contains only a general provision as to the payment of a yearly bonus, the Court should look to other documentary proof regarding the calculation and application of the bonus provision. Specifically, Dr. Collins suggests that a letter from Dr. Nickey, as president of APL, dated April 8, 1974, sets forth in detail the methodology for determining compensation for APL employees. According to the Plaintiff, that letter specifically promises Dr. Collins an equal share of each yearly bonus, concluding with the line, "[S]ave this letter for contract structuring purposes later." In addition, Dr. Collins also points out that prior to 1980, all of the pathologists of APL had received yearly bonuses which equalized the compensation paid to them.

Dr. Collins entered into his first contract with APL on June 15, 1974. That contract was replaced by an employment agreement signed by APL and Dr. Collins in 1977. According to that 1977 contract, "The Employee's compensation shall be fixed from time to time by the corporation's board of directors, and shall consist of a basic salary with or without supplementation by way of bonuses, special awards or allowances." Section 15 provides:

> "(a) This Agreement constitutes the entire agreement between the parties and contains all of the agreement betweeen the parties with respect to the subject matter hereof; this Agreement supercedes any and all

other agreements, either oral or in writing, between the parties hereto with respect to the subject matter hereof.

(b) No change or modification of this Agreement shall be valid unless the same be in writing and signed by the Employee and the Corporation. No waiver of any provision of this Agreement shall be valid unless in writing and signed by the person or party to be charge."

Judge Ackerman, in an order entered on October 7, 1982, discussed this same contract language in ruling on a Motion to Dismiss Dr. Collins' original complaint in this action. Judge Ackerman found that the written 1977 employment contract formed the complete agreement of the parties. He also found that the terms of the contract were not ambiguous and the Plaintiff "as a matter of law, is not entitled to 'share equally' in all income and revenue of the corporation."

Although the claims dismissed by Judge Ackerman are not identical to the present claims at issue, Judge Ackerman's ruling is dispositive on the issue of the compensation due under the contract. This Court's ruling reflects Judge Ackerman's order that the contract is not ambiguous and clearly establishes that the Plaintiff is not "entitled" to a share of the income and revenue of APL in the form of bonuses for 1980 and 1981.

The Court finds that the contract language quoted above unambiguously sets forth the compensation to which an APL member is entitled. It is clear from the contract that the payment of a bonus is within the discretion of the board of directors: the board is given the power to fix an employee's compensation, and there is no other language

in the contract which limits that discretion or details how it must be exercised. The law is clear in Illinois that where the award of a bonus is discretionary, an employee may not compel payment as a matter of right. *Mosow v. National Lock Co.,* 118 Ill.App.2d 232, 255 N.E.2d 500 (2nd Dist. 1970) (employee not entitled to receive a bonus where letters that indicated he would be a participant in a "contingent compensation plan" indicated that the decision whether to pay an employee a bonus was subject to the discretion of the board of directors).

Moreover, there is nothing in the evidence submitted by the parties which suggests that a particular predetermined formula was in place which established a means of calculating the amount of bonuses that would be paid to APL pathologists. Thus, not only does the contract establish that the bonus is discretionary, but the Court would not be able to enforce a contractual term requiring payment of a bonus because the Court cannot enforce a promise that is uncertain and indefinite.

Dr. Collins suggests that the April 8, 1974 letter from Dr. Nickey on behalf of APL establishes the Plaintiff's right to a bonus, but the Court finds this argument unpersuasive. The letter does state, ". . . [Y]ou would share in any bonus equally with other employees," and, "Save this letter for contract structuring purposes later." However, this letter was written in 1974, and when Dr. Collins signed his employment contract of 1977, he agreed that his compensation would consist of a "basic salary *with or without* supplementation by way of bonuses" (emphasis added). He also agreed that the written employment contract was the entire agreement between himself and APL and superseded any and all other agreements, whether oral or writ-

tn. If Dr. Collins believed that the letter from Dr. Nickey established an enforceable right to a yearly bonus, then he should have brought that up prior to signing the 1977 agreement, which clearly allows the board of directors to set bonuses. The contract is clear and understandable, and Dr. Collins cannot now be heard to complain that he agreed in 1977 to something less than what he really wanted or expected.

Dr. Collins has not presented this Court with any evidence that would create a genuine issue of material fact with regard to the payment of a bonus under the terms of the contract in effect between APL and Dr. Collins in 1980 and 1981. Consequently, the Court orders that summary judgment is granted for the Defendants on Count VII of the complaint.

MISREPRESENTATION BY THE INDIVIDUAL DEFENDANTS

In Count VIII, the Plaintiff alleges a claim against the individual Defendants for misrepresentation by word or deed during his recruitment, which led him to leave his position as director of laboratories at Community Hospital of Brooklyn, New York, and join APL as a pathologist for St. John's Hspital in Springfield, Illinois. Dr. Collins alleges in particular that the Defendants represented to Dr. Collins that he would share equally as a partner in all income through pension, profit sharing, and other benefit plans. During the years 1974 through 1979, the Defendants continued to represent to him that he would share equally in all the income, revenue, and benefits of APL. In 1980 and 1981, however, APL refused to pay Dr. Collins a bonus, and he argues that because of the misrepresenta-

tions made by the Defendants, they should be estopped from withholding from Dr. Collins his equal share of all income and revenue of APL for the fiscal years 1980 and 1981.

The factual allegations in this claim vary somewhat from the breach of contract claim in Count VII, but the analysis which the Court must use is similar. Dr. Collins is alleging that the representations made by the individual Defendants caused him to leave New York and pursue employment with APL. The representations also led him to believe that he would share equally in all profits and revenue, including bonus awards, during his years with APL. However, the complaint contains no allegation that Dr. Collins was, in fact, damaged by his decision to leave New York and obtain employment with APL, other than his subsequent loss of bonuses in 1980 and 1981. Therefore, the Court reads Count VII as requesting damages only for the bonuses to which Dr. Collins feels he is entitled, and it does not involve any claim that he suffered injury because he gave up one employment opportunity for another.

As this Court explained in ruling on Count VII of the complaint, prior to beginning his work with APL, Dr. Collins entered into an employment contract in 1974, which led to a subsequent contract in 1977. That contract provided for compensation to consist of a "basic salary with or without supplementation by way of bonuses." The contract also contained a provision that the employment contract would supersede any and all other agreements, either oral or written, and would constitute the entire agreement between the employee, Dr. Collins, and the employer, APL.

There are no allegations and there is no evidence presented that when Dr. Collins signed this agreement, he was signing with the understanding that the words in the contract did not mean what they said because of the alleged representations made by the individual Defendants. In light of the contractual language which clearly establishes that the award of bonuses is up to the board of directors of APL, the Court finds that Dr. Collins has failed to raise a genuine issue of material fact with regard to his claim for the unpaid bonuses of 1980 and 1981 resulting from the misrepresentations of the individual Defendants. The Court orders that summary judgment is granted in favor of the Defendants on Count VIII of the complaint.

WRONGFUL REMOVAL OR REDUCTION OF STAFF PRIVILEGES

In Count IX, the Plaintiff alleges that the Defendant St. John's Hospital unlawfully removed or reduced his staff privileges in violation of the by-laws of the Hospital. The Plaintiff argues that the Defendant Hospital did not comply with the by-laws of the Hospital when they substantially removed or reduced Dr. Collins' staff privileges in pathology by preventing him from practicing pathology in the pathology laboratory. The Defendant, on the other hand, points out that Dr. Collins was not entitled to any type of procedure regarding his staff privileges, because the Hospital never removed or reduced the Plaintiff's staff privileges. Rather, the Defendant argues that the evidence shows that Dr. Collins continues to retain his staff privileges at St. John's Hospital, even though those privileges are maintained on a leave of absence status.

Although this is a rather technical argument, the Court believes as a matter of law that the Defendants are correct in asserting that the Hospital has not reduced or removed Dr. Collins' staff privileges. A hospital requires that a physician have staff privileges at its facility as a means of insuring that a doctor is qualified to practice in his profession and that the hospital will fulfill its public service function of delivering quality medical services to its patients. Dr. Collins was not entitled to be employed by the Hospital simply because the Hospital had granted him staff privileges, even if the Hospital would not have employed him had he not had staff privileges. A hospital's decision to grant to deny staff privileges is based upon the qualifications of the physician, and a hospital is not required to employ everyone to whom it has granted staff privileges.

In the present case, Dr. Collins is asserting that because St. John's Hospital had granted him staff privileges, he was entitled to practice pathology in the Hospital's pathology laboratory, using the Hospital's laboratory equipment. However, St. John's Hospital declined to hire Dr. Collins because they already had a contractual arrangement with APL for the provision of all of their pathology services. The Hospital never made an issue out of Dr. Collins' qualification to practice pathology, which would have been the real issue at a hearing involving the reduction or removal of his staff privileges. Dr. Collins maintains his staff privileges at St. John's Hospital at the current time under a leave of absence status; because the Hospital never reduced or removed his staff privileges, there was no issue or dispute about his qualifications which a hearing and other procedures in the by-laws could

have addressed. It is true that Dr. Collins has been refused employment by St. John's Hospital, but this is due to the contract between the Hospital and APL and cannot be characterized as a reduction or removal of staff privileges which would require the procedural protections written into the Hospital's by-laws. The Court orders summary judgment in favor of the Defendants on Count IX.

TORTIOUS INTERFERENCE WITH STAFF PRIVILEGES

Count X of the complaint is similar to Count IX but is aimed at the individual Defendants and APL for allegedly inducing St. John's Hospital to remove or reduce Dr. Collins' staff privileges in pathology and to exclude Dr. Collins from practicing pathology at the Hospital in violation of the St. John's by-laws. The foregoing analysis of the arrangement between APL and St. John's Hospital makes it clear that this count, too, must fall on the Defendants' Motion for Summary Judgment.

The Court has already determined as a matter of law that St. John's Hospital did not reduce or remove Dr. Collins' staff privileges when they refused to allow him to practice pathology after he had resigned from APL. Because there was no reduction or interference with staff privileges, it follows that the other Defendants cannot be liable for inducing a reduction or intereference.

Moreover, the Court has already upheld the legality of the contractual arrangement between APL and St. John's Hospital against the Plaintiff's claims that the arrangement violated federal and state antitrust laws. In implementing and enforcing this agreement, the Hospital

decided not to hire Dr. Collins after his resignation from APL. Clearly, the effect of the agreement (at least as put into practice by the parties) was to deny Dr. Collins (as well as any other pathologists outside of APL) the opportunity to work for St. John's Hospital once he had resigned from APL. Because the Court has found that the agreement was legal and did not violate antitrust laws, the Plaintiff cannot argue that the parties to the agreement committed a tort by adhering to the terms of that agreement. The Court finds that even if the Defendants had caused St. John's to comply with the agreement by not hiring Dr. Collins, such action was taken pursuant to a lawful agreement and cannot form the basis for Dr. Collins' Count X claim that APL and the individual Defendants interferred with Dr. Collins' staff privileges because he was refused future employment at the Hospital. The Court finds in favor of the Defendants on their Motion for Summary Judgment with regard to Count X of the complaint.

CONCLUSION

Based upon the foregoing analysis, the Court finds that the Plaintiff has not raised a genuine issue of material fact with regard to any of his claims in the complaint. The Court orders that the Defendants' Motions for Summary Judgment are GRANTED. The Clerk is directed to enter summary judgment in favor of the Defendants on all counts of the Complaint.

It is so ordered this 11th day of February, 1987.

/s/ Michael M. Mihm
United States District Judge

(2)

Supreme Court, U.S.
FILED
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No. 88-123

In The

Supreme Court of the United States

October Term, 1988

JAMES G. P. COLLINS,

Petitioner,

v.

ASSOCIATED PATHOLOGISTS, LTD., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Seventh Circuit correctly applied the standards for summary judgment as set forth by this Court in *Matsushita Electric Industrial Co. v. Zenith Radio Co.*, 475 U.S. 574 and other recent U.S. Supreme Court cases.

Whether the United States Court of Appeals for the Seventh Circuit correctly applied the standards for determining the "Relevant Market" in an anti-trust claim, by concluding the "Relevant Market" to be of national scope where the challenge is of a hospital's contract for delivery of pathology services.

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No. 88-123

In The
Supreme Court of the United States
October Term, 1988

JAMES G. P. COLLINS,

Petitioner,

v.

ASSOCIATED PATHOLOGISTS, LTD., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

Respondent, St. John's Hospital of the Hospital Sisters of the Third Order of St. Francis, on behalf of themselves and all others similarly situated ("Defendants"), respectfully oppose the Petition for Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in above- captioned cause on April 20, 1988.

OPINIONS BELOW

The Central District Court of Illinois' order of summary judgment is reported at 676 F.Supp. 1388 (C.D. Ill. 1987). The Seventh Circuit Court of Appeals' opinion affirming this order of summary judgment is reported at 844 F.2d 473 (7th Cir. 1988). In addition, both opinions are reproduced in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

See Petition for Writ of Certiorari, at page 2.

PROVISIONS OF STATUTES AND RULES INVOLVED

See Petition for Writ of Certiorari, at pages 2-3.

STATEMENT OF THE CASE

This case involves the claim of a pathologist, James G. P. Collins, an ex-employee and prior shareholder of Associated Pathologists, Ltd. (A.P.L.), that the exclusive contract which his ex-employer, A.P.L., had with St. John's Hospital (St. John's), an Illinois not-for-profit corporation, for the delivery of pathology services to its patients at its Hospital was in violation of Sections 1 and 2 of the

Sherman Anti-Trust Act and additionally that he was wrongly deprived of his staff privileges at St. John's Hospital.

The motions for summary judgment filed by St. John's Hospital and A.P.L. were granted by the District Court and affirmed by the Seventh Circuit Court of Appeals.

St. John's Hospital is a large, not-for-profit hospital, some 750 beds, owned and operated under the auspices of the Hospital Sisters of the Third Order of St. Francis.

It has a significant primary and tertiary care patient load, with its primary care patients coming from the surrounding counties, its tertiary care services drawing patients from some 20 nearby counties. It has specialties in obstetrics, high risk neonatal services, pediatrics, trauma, and cardiology and cardiac surgery.

Its counterparts in Springfield are Memorial Medical Center with some 600 beds with primary and tertiary services as well, though of somewhat different emphasis and Humana Hospital, a 150 bed primary care facility. Southern Illinois University has a medical school with its interns and residents at both St. John's and Memorial.

Associated Pathologists, Ltd. is a corporation which has contracted with St. John's Hospital to provide all pathology services to that hospital. It does this presently through a written contract dated October, 1983, and has done so under various contracts since 1970. There are some 6 shareholders and employees of A.P.L., all pathologists.

The written contract may be terminated by 90 days written notice without cause by either party.

There is considerable work regarding pathology in a hospital of this size. The pathologist's role is generally classified as either "anatomical" or "clinical".

The "anatomical" pathologist's function is the taking, examining and analyzing specimens, body tissue or fluids, removed in the course of a surgical procedure.

The "clinical" pathologist's work is more administrative. There are 3 to 4 pathologists of A.P.L. who do the clinical work here at St. John's. They oversee the 140 full time employees of the laboratory, who operate in any of 7 different sections—Hematology, Chemistry, Special Chemistry, Immunology, R.I.A. Requisitioning, Transfusion Services and Microbiology. These employees do everything from the collecting of the samples from the patient on the floor, delivery to the laboratory, running the tests of the sample and publishing the results, and remitting that information back to the patients record on the floor, to the checking of the machinery to verify the correctness of its results. Some 600 specimens are obtained daily, with 2,000,000 tests done annually.

The other work of pathology—"anatomical"—is performed by 2 to 3 pathologists. They process tissue and fluid specimens obtained, some 22,000 annually, in any of the 22 surgical suites there in the hospital and write written opinions regarding those findings for the treating physicians' followup.

James G. P. Collins came to A.P.L. in early 1970 and left A.P.L. in January, 1982.

Ted Druhot, the administrator of St. John's Hospital, first learned of any difficulty with Collins when

Dr. Nickey, the originator of A.P.L., advised Druhot that Collins would be leaving and he, Collins, was not carrying his share of the work. Shortly thereafter, Collins contacted Druhot saying he would consider an "independent relationship" with the Hospital. Mr. Druhot said he would consider it, spoke with his assistant administrator about it, and concluded there could not be harmony in the laboratory with both Collins and A.P.L. and advised Collins accordingly.

Druhot asked Collins to consider doing the laboratory work for the entire hospital, which Collins declined to do.

Collins never spoke with Druhot again on the subject. Collins left for California in January, 1982, and asked the hospital to place him on leave of absence, which as of 1985, was still his status at St. John's.

Dr. Collins did not make a request for any type of hearing before the head of the department, administrator of the hospital, or Board of Directors regarding any dispute he had with A.P.L., any issue of his staff privileges, or reduction of his privileges or the refusal to employ him or proposal to furnish laboratory services for the entire hospital.

St. John's Hospital has contracted with a corporation, here, A.P.L., for the latter to provide the entire scope of pathology services for several reasons:

(1) To assure 24 hour coverage for pathology services;

(2) To improve hospital control over quality and cost of professional services;

(3) To improve recruitment of physician pathologists;

(4) To assign responsibility for the entire operation to one party; and

(5) To improve patient care.

Mr. Druhot felt this was the best type of arrangement for St. John's at that time.

Humana Hospital only uses this type of contract for pathology at its some 100 hospitals. (Collins is employed as the pathologist at Humana Hospital in San Leandro, California under a contract like A.P.L. has with St. John's.)

Dr. Kenneth Earle, a board certified pathologist and head of medical affairs at Our Lady of Lourdes Hospital in Lafayette, Louisiana, a 400 bed hospital, stated in his deposition he uses this type of contract for pathology, radiology and emergency services.

Mr. Laabs, Administrator of St. John's Hospital now, states in obtaining his M.B.A. degree, he found this arrangement—exclusive contract—the most prevalent in the New York City Hospitals he was writing about in one of his thesis papers.

A.P.M. Incorporated, a management consultant firm, did a strategic market plan for St. John's in 1982. It felt that St. John's Hospital is one of the most clinically sophisticated hospitals in the country on such "ancillary services like radiology and laboratory."

The American Hospital Association has a number of publications dealing with various statistical factors and hospitals and in its "Monitrend" report, a quarterly, it is

noted that on some ratios, St. John's is better than the national average; in some instances, the same or less than the national average, but never less than in the 3rd quantile and when compared to the neighboring Memorial Medical Center, St. John's does well in these ratios of numbers and costs of procedures, laboratory labor costs per procedure as compared to total procedure cost, professional laboratory cost as compared to total procedure cost and like statistics.

St. John's contract with A.P.L. in the early 1970's provided for compensation as a percentage of gross laboratory charges. In 1975, the contract was changed to provide for payment at a fixed rate for each procedure based upon a New York relative value scale. This is essentially the method used today, though based upon different factors and the Medicare guidelines. The change in 1975 was to reduce patient costs; i.e. to make certain that laboratory prices tracked with laboratory expenses and not general hospital expenses which were increasing rapidly because of labor increases at that time, and likewise the recognition that since the laboratory process was becoming so machine oriented, with the ever increasing use of machines to test the samples and give the results, labor was no longer the principal element in the laboratory process.

The method of charging for laboratory services and rate of charge is in conformity with Medicare guidelines and those other third party payor requisites.

There is no indication in this record that the charge for any particular test or series of tests is excessive or otherwise inappropriate.

The charges for the work done in the laboratory in the years prior to 1983 was included in the patients' bill for other hospital services; those laboratory charges included a "component" reflective of the hospital costs, i.e. labor, equipment and supplies. It also included a "professional component" which was the pathologists' compensation based upon the percentage of gross charge prior to 1975 and since then on a "unit value" scale.

Since 1983, however, the pathologist charges for the pathology work have been divided between the ''clinical'' component, and the ''anatomical'' component. The charge relative to the pathologists work in connection with the overview of the equipment and the 140 laboratory employees, i.e. the "clinical component", is included as a part of the hospital charge for those pathology services and like other specific hospital charges—surgical suite, surgical supplies, anesthesia or whatever, Medicare reimburses for that if this is a reasonable cost. On the other hand, the other feature, i.e. ''anatomical'' work, (where the pathologist is doing the evaluation of a specimen removed from the body in the course of surgery) is separately charged for and separately billed for (like any other physician bills), though the Hospital bills for it, because of the A.P.L. request that the hospital do it.

The Hospital monitors the pathologists' ''anatomical'' charges to insure that these surgical pathology charges do not exceed the 75th percentile of the Medicare profile of the ''prevailing'' charge for that work.

Dr. Collins had practiced pathology in New York, in Springfield from the early 1970's until 1982, then in California. Dr. Nickey and Dr. Van Fossan, both sharehold-

ers and employees of A.P.L. since 1970, were from Texas. Dr. Kenneth Earle had earlier practiced pathology in Texas and Washington, D.C. before coming to Louisiana.

Dr. Collins, when speaking with Druhot in 1982, indicated that there were some 200 pathologists presently seeking employment through the College of American Pathologists.

Dr. Collins made no effort to see if there were a pathology position open at Memorial Hospital or Humana Hospital in Springfield.

Dr. Collins, himself a practicing pathologist, had never had a patient request his services. The Humana representative, in her deposition, stated that she in over 30 years of employment had never heard of a patient choosing a hospital on the basis of the pathology department. Physicians rarely request specific pathologists. Generally, pathology is a hospital based specialty, where the patient has little or no contact with the pathologist; the pathologist's principal interaction is with the pathology department employees and overview of the equipment in that department.

As is noted from the deposition of Dr. George Andrews, an anesthesiologist at St. John's Hospital, anesthesiology is a differently oriented practice—patient oriented; he has some 3-4 surgical patients per day and preoperative examinations for 3 to 4 patients to have surgery the following day and 3 to 4 post surgical follow-ups.

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REASONS AND ARGUMENT FOR DENYING THE WRIT

I.

SUMMARY JUDGMENT IS APPROPRIATE, WHEN THE RECORD TAKEN AS A WHOLE COULD NOT LEAD A RATIONAL TRIER OF FACT TO FIND FOR THE NONMOVING PARTY AS "THERE IS NO GENUINE ISSUE FOR TRIAL"; AND THIS CONCLUSION WAS REQUIRED UNDER THE EVIDENCE IN THIS RECORD.

There are essentially three claims against this St. John's Hospital; that the arrangement for delivery of pathology services was a "per se" violation of Section 1 of the Sherman Act, as a "tying" arrangement or a "boycott." Secondly this arrangement, an exclusive dealing agreement, was an unreasonable restraint of trade and thus, a violation of Section 1. Finally, the physician's staff privileges were wrongfully eliminated or reduced in violation of the hospital bylaws.

We repeat the claims made, because it is against this background that the claim of the pathologist that the motion for summary judgment was improvidently granted, must be examined.

The argument that the arrangement was a "per se" violation of the Act, as a "tying arrangement, means that the arrangement is essentially without any redeeming social value.

This Court in *Northern Pacific v. U.S.*, 356 U.S. 1, at 5, 2 L.Ed.2d 545 stated the rationale for the "tying" and "per se" rule:

> "However, there are certain agreements or practices which because of their pernicious effect on competi-

> tion and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

The assertion is made, likewise, that the arrangement could be classified as a "boycott," and that "boycotts," like "tying" arrangements, are "per se" violations.

When one recalls the purpose of declaring a "tying" arrangement or "boycott" as unlawful per se—because it is so contrary to our accepted business practices, it is clear that the purpose of and the effect of this arrangement for the delivery of pathology services in a hospital, simply does not fit that type of dreaded and despised arrangement.

In this record there is a complete absence of any "pernicious" effect of this arrangement upon competition and more importantly, there is positive evidence of the benefit of this arrangement to obtain high quality test results, with 24 hour round the clock coverage, with backup as needed, at a reasonable cost to the patient.

To be successful on the alternate claim of Section 1, Sherman Act violation, (assuming no "per se" violation), the pathologist has the burden of proving that this arrangement has "unreasonably restrained competition". *Jefferson Parish Hospital v. Hyde,* 466 U.S. 2, at 29, 80 L.Ed.2d 2.

This then is the setting in which the grant of the motion for summary judgment is to be judged.

Appellant is critical of this Seventh Circuit consideration of the principles regarding motions for summary judgment. We disagree.

The appellant states that *Matsushita Electric Industrial v. Zenith Radio,* 475 U.S. 574, 89 L.Ed.2d 538, at p. 553, states that in evaluating a summary judgment:

> "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion."

This language, however, must be read in view of the sentence that followed at p. 553:

> "But Anti-Trust Law limits the range of permissible inferences from ambiguous evidence in a Section 1 case. Thus in *Monsanto Co. v. Spray Rite Service Corporation* (citation), we held that conduct as consistent with permissible competition, as with illegal conspiracy does not standing alone support an inference of anti-trust conspiracy (citation). To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of Section 1 must present evidence 'that tends to exclude the possibility that the alleged conspirators acted independently.' (Citation). Respondent in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action . . ."

Note also this Court's language at p. 552:

> "Second, the issue of fact must be 'genuine.' Fed. Rule Civ. Proc. 56(c), (e). When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. (Citation).
>
> In the language of the Rule, the non-moving party must come forward with 'specific facts showing that there is a *genuine issue for trial.*' Fed. Rule Civ. Proc. 56(e) (emphasis added). See also Advisory Committee Note to 1963 Amendment of Fed. Rule Civ. Proc. 56(e), 28 USC App., p. 626 [USCS Court Rules,

> Fed. Rules of Civ. Proc., Note following Rule 56] (purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial'). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" (citation).

The appellant seems critical of the Seventh Circuit because the Seventh Circuit stated that *Matsushita's* emphasis that there must be a genuine issue for trial, "indicates that a summary judgment motion is like a trial motion for a directed verdict, and that 'genuine' allows some quantitative determination of the sufficiency of the evidence," p. 5, 844 F.2d 476.

However, this Court in *Jack Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 91 L.Ed.2d 202, p. 214 (1986) states:

> "And we have noted that the 'genuine issue' summary judgment standard is 'very close' to the 'reasonable jury' directed verdict standard: 'The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted.'" *Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731, 745, n. 11, 76 L. Ed. 2d 277, 103 S. Ct. 2161 (1983).

The Court at p. 214 uses these words:

> "In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."

and at p. 213:

> "The petitioners suggest, and we agree, that this standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Brady v. Southern R. Co.*, 320 U.S. 476, 479-480, 88 L.Ed. 239, 64 S.Ct. 232 (1943).

and at p. 213, quoting from *Improvement Co. v. Munson*, 14 Wall. 442 at 448:

> "Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." (Footnotes omitted).

The only conclusion to be drawn from all of this is that a motion for summary judgment will be granted in some instances, even though there is a "factual" dispute. It will be granted in those instances where, notwithstanding the factual dispute, the evaluation of the evidence as a whole "is so one-sided that one party must prevail as a matter of law." *Jack Anderson v. Liberty Lobby*, supra, p. 214.

This then is the background for determining the propriety of this district court's grant of the motion for summary judgment, where the claim is that the arrangement for the delivery of pathology services at that hospital is "pernicious" and without any redeeming social value.

We respectfully state that the District Court and Court of Appeals were absolutely correct in their assessment of the applicable principles and their judgment, that, as a matter of law, on the evidence in this record, no verdict for plaintiff could ever stand on this claim.

More to the particulars of this claim, plaintiff states that there is an unlawful "tying" of two distinct products or services in two distinct markets—that pathology services in the hospital are separate and distinct from hospital services.

In *Hyde v. Jefferson Parish Hospital*, 466 U.S. 2, 80 L.Ed.2d 2, this Court has specifically recognized that with some hospital based physicians, their work is part and parcel of the hospital in general—referring specifically to pathology. *Hyde* Footnote 36 at p. 19, 80 L.Ed.2d 2. Your Court noted that while there may be a service of anesthesiology, separate from the hospital services generally, since the anesthesiologist's work is personal and patient oriented, that was unlike other hospital based specialties like pathology.

In addition to what is noted there, the evidence in this record shows plaintiff, himself a pathologist, board certified for 17 years, has yet to have a patient request his services. In addition, physicians rarely ask for a consult from a specific pathologist—the pathologist rarely has any "patient contact"; the work is largely administrative,

overseeing various laboratory technicians and machines and establishing quality control procedures and monitoring laboratory results.

Thus, while there are *claims* that there is a separate and distinct, discreet product, or service of pathology, separate from other hospital services, there is a total absence of evidence in that regard.

We submit that the Appeals Court characterization of the evidence as "overwhelming", that there are no two distinct products—"pathology", as distinct from hospital services, is accurate.

Likewise, just as in *Hyde,* supra, 466 U.S. 2 at 26-28, there is no evidence of any "forcing" of a patient to purchase the separate and distinct, or discreet "tyed" product or service, the patient did not otherwise need or want, there is a total absence of evidence of "forcing" in this record. In that regard, note that it is the attending physician or consulting physician, and not the hospital employee, or the pathologist, who is ordering the laboratory work for a given patient.

Apart from the "tying"—"per se" violation—the claim is made that the "arrangement" is violative of Section 1 under a Rule of Reason analysis, because it is an "exclusive dealing" arrangement which operates as an unreasonable restraint upon competition.

First, it is noted that all agreements result in some restraint of trade or competition and secondly, not all exclusive contracts violate the Sherman Act.

In *Hyde,* supra, 466 U.S. 2 at 29, 31-32, after finding that the anesthesiology arrangement was not a "tying" ar-

rangement and not a "per se" violation of the Sherman Act, the Court remanded the matter for further consideration on the issue of whether or not it was an unreasonable restraint upon competition, an issue on which the plaintiff would have the burden of proof of its "unreasonableness".

The Court also suggested that a proper analysis of the unlawfulness required a determination of the market in which the forces operated (i.e. competition among anesthesiologists), to see what effect the Roux type contract had in that market and thus to determine, if the effects obtained were or were not unreasonable.

Drawing on *Hyde* then, the District Court and the Appeals Court here felt that the competition to be considered was that among pathologists; it found that the market in which the pathologists competed was nationwide. Both of those courts noted that plaintiff himself practiced first in New York City, then Springfield, Illinois, then in San Leandro, California. Several other pathologists of A.P.L. practiced first in Texas, then in Springfield. Plaintiff, when talking with the administrator of St. John's Hospital, observed that in the College of American Pathology there were some 200 pathologists seeking employment nationwide.

This market analysis was undertaken as well in view of the *Tampa Electric v. Nashville Co.*, 365 U.S. 320, 5 L.Ed.2d 580. There the market was those coal producers, within a 7 state area, who were competing for the opportunity to deliver coal to Tampa Electric, the electric utility, under a 20 year supply contract with a cost in excess of $100,000,000 over the life of the contract.

We submit that the only evidence on this issue in this record shows unmistakably that the relevant market is national, which is required as a fair reading of *Hyde* and *Tampa Electric.*

Further then, on the basis of *Tampa Electric,* the district court and the appeals court found that the pathologists leaving this St. John's Hospital would have no impact on that national market.

The District Court considered the claim of "boycott" first as a "per se" violation and then as one to be analyzed under the Rule of Reason principles. Each court noted that in earlier years, the "boycott" may have received the "per se" labeling, though in recent times the cases have spoken of "boycott", whenever the action under examination had some redeeming value, in terms of the Rule of Reason analysis. *U.S. Trotting Assn. v. Chicago Down Association,* 665 F.2d 781 (1985 - 7th Cir.) and *Marrese v. American Academy of Orthopedic Surgeons,* 706 F.2d 1488, p. 1495 (1983 - 7th Cir.). We submit that this is a correct perception.

The "boycott" claim is bottomed on the idea that St. John's Hospital and the other A.P.L. pathologists agreed to exclude Collins from practice.

There is no testimony that there was any such agreement to "boycott" Dr. Collins.

There was testimony, however, that both an A.P.L. director and Dr. Collins spoke with the St. John's Hospital administrator, Druhot, about the situation and Druhot determined he did not wish to employ Dr. Collins at that time.

We submit that under the *Monsanto Company v. Spray Rite Service Corporation*, 465 U.S. 752 (1984) and *Matsushita Electric Ind. v. Zenith Radio*, 475 U.S. 574 (1986) where the evidence is consonant, as well with a *lawful* purpose, as with an *unlawful* purpose, that information alone cannot be the basis for summary judgment condemning the actions or statements.

We have exactly the situation here, where there is constant need for this hospital to talk to all of these parties each in furtherance of lawful contract aims. Consequently, because there is this regular exchange going on, this Court has stated, as a matter of policy, that lawful exchange of ideas, arguably which are in furtherance of the lawful purposes of the Sherman Act must be protected, because to do otherwise would stifle competition, the very thing the Act was designed to promote. Thus, if the evidence can have either construction (lawful or unlawful) equally well, the activity must be allowed to continue; and it is only when the activity can be demonstrated to be wrong, quite independent of the equivocal evidence under consideration, that the activity should be condemned as a violation of Section 1. *Monsanto*, supra and *Matsushita*, supra. This evidence of these conversations has both these lawful and unlawful constructions. Because it lends itself to either construction, and because this is the only evidence on this issue, the motion for summary judgment here was properly granted.

The final claim is that Collins' staff privileges were wrongfully curtailed, or eliminated in spite of procedures for handling under the hospital bylaws.

Dr. Collins spoke once with the hospital administrator about "an independent relationship" with the hospital. The administrator said he would consider it; which he did. He decided against it and suggested alternatively that Dr. Collins consider a proposal to perform all pathology work for the hospital, which Collins declined to do.

Dr. Collins, at his request, was placed on leave of absence—the status he holds as of 2 years ago.

No hearing was ever requested by Dr. Collins, on this issue or any other issue regarding his A.P.L. or hospital status, and none took place.

The District Court and Appeals Court both found that there was no hearing requested, found that Collins' staff privileges had not been reduced or revoked and granted this hospital's motion for summary judgment accordingly.

The plaintiff's expert had several conclusions on the inappropriateness of the exclusive agreement for pathology services, the divisibility of pathology services from hospital services, cost effectiveness of a different pathology arrangement, and the like, which are either not relevant to the issues, or are directly contradicted by other evidence in the record coming from witnesses having no interest in this litigation, or contrary to the observations and experiences of the ordinary person from life.

That being true, the District and Appellate Court were correct with regard to the grant of the motion for summary judgement—in that there was no "genuine issue for trial", since there was not "sufficient evidence favoring the nonmoving party for a jury to return a verdict

for that party," *Jack Anderson v. Liberty Lobby, Inc.*, supra p. 212, 91 L.Ed.2d.

The plaintiff makes a number of other assertions dealing with its claims that the arrangement was a "per se" violation or alternately, violative of the "Rule of Reason" analysis required by Section 1, i.e. there was a shortage of anatomical pathologists, delays in the provision of pathology services, use of antiquated equipment, inappropriate rate structure for inpatient and outpatient services, and charging at physicians rate for technicians work.

The district court had extensive documentation through the discovery process, of the workings of this St. John's Hospital in this delivery of pathology services.

The principal thesis of the district court in rejecting the "per se" claim of "tying" was there were no separate and distinct markets for pathology services, as distinct from other hospital services.

In considering that claim, and the other claims of "boycott" and "exclusive dealing" where the assertion was the arrangement violated the Rule of Reason principles of Section 1, the Court considered the other evidence elicited by plaintiff above.

And in that search, each court concluded that the "market area" in which the competition was to be measured, was "national" and different than that claimed by plaintiff. Moreover, it found no evidence of any anti-competitive effect and, thus found contrary to plaintiff.

Even if you assume the above courts were incorrect on all of these ideas, we suggest that the facts in this case still leave one to conclude that there is no "genuine issue

for trial'' since there is no justification for the jury to determine that this arrangement is an unreasonable restraint upon competition.

The testimony rather is that the arrangement affords a lower price for the consumer product, demands accountability of one party for all pathologists' services, assures continuity of service and round the clock coverage and improves quality of care for the patient.

As to the specifics ot the claims of plaintiff, the evidence in this record does not demonstrate that there is any credence, to a claim of a delay in the delivery of pathology services, nor that any assumed delay is attributable to the fact that this hospital has this type of contract for pathology services. As to the claim the equipment is antiquated, the testimony is that there has been continual reinvestment of funds over the years in acquiring new analyzing equipment and in the computerization of the laboratory. The claim is made that it is inappropriate to charge differently for inpatient, as against outpatient laboratory work; the response is that obviously the hospital has less work to do for outpatient work, in that its employees do not obtain the specimen, nor label it or deliver it to the laboratory for processing and thus less cost.

The claim is made that hospital is charging the patient for work done by technicians at physicians' rates. The evidence rather is that the bulk of the work done by pathologists is ''clinical'' or ''administrative''. This is the overseeing of the employees in the Chemistry, Blood or other sections. The technicians give to the pathologist test results, when the results seem beyond the norm for

the pathologists' input and judgment. The pathologists write the procedures for the taking of samples and the maintenance and verification of the various machine procedures being done. The compensation of the pathologist for this work as was noted earlier, since 1983 has been based upon an assumed work load format, instituted by the Hospital in compliance with the Medicare regulations of 1983 and like protocol of the other medical insurance providers. Thus, the patients' bill for pathology work includes an arbitrary component for this pathologist physician's input determined from these principles and based upon cost accounting principles. This methodology is not something contrived by this hospital. It is this procedure for billing which makes plaintiff state that the patient is being charged at physician's rates for the technician's efforts.

We respectfully submit, then, as we feel was felt by the District Court and the Court of Appeals, that there is no "genuine issue for trial" in this record as to the propriety of this arrangement for the delivery of pathology services regardless of how one defines the Market Area or attempts to measure the impact upon that Market Area, since there is no unreasonable restraint upon competition as envisaged under the Rule of Reason.

To conclude, this respondent submits that the Appeals Court correctly defined the standard to be used in determining the appropriateness of a Summary Judgment and the evidence is consonant with that grant of the summary judgment motion, as based upon an examination of the record as a whole, there is no "genuine issue for trial". Consequently, there is no reason to grant the petition for writ of certiorari.

II.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE MARKET AREA WHICH IS THE SUBJECT OF INQUIRY UNDER A SHERMAN ACT CLAIM, REGARDING ANTI-COMPETITIVE EFFECTS OF A CONTRACT OR PATHOLOGY SERVICES IS NATIONAL IN SCOPE, AND CORRECTLY FOUND FROM THE ONLY EVIDENCE IN THIS RECORD THAT THAT MARKET IS, INDEED, NATIONAL.

We have dealt earlier with the facts regarding definition of market area, since it seems intertwined with the treatment of the question of the appropriateness of the summary judgment grant.

We would repeat, however, that *Tampa Electric,* supra, indicates that the scope of the inquiry may be over a number of states and may focus upon a different set of players than might be considered at first glance. In *Tampa Electric* the competition being measured was amongst the suppliers of coal, the mining companies from the several surrounding states; it was not the retail consuming public.

In *Hyde,* supra at p. 23, the competition to be concerned with was amongst anesthesiologists and the effect that the exclusive contract had on competition among anesthesiologists; that Court remarked the inquiry may be statewide or merely local.

The only evidence in this record is that plaintiff has practiced in New York, Illinois and California; that several of plaintiff's ex-employees have practiced in Texas and Illinois; that one other pathologist who testified has practiced in Texas, Washington and Louisiana; that plaintiff himself suggests the market is national when he states

some 200 pathologists are advertising for placement in their Board Publications.

That the market is national is further corroborated by the fact that the practice is not patient oriented, rather administrative or research oriented, and thus less of a likelihood to find a "patient base" requiring the physician to remain in one locale to maintain a livelihood.

We submit that given the instructions of this Court in *Tampa Electric* and *Hyde* to determine the market area in which the competitive forces operate and the only evidence in this record as indicated above, the District Court and Appeals Court were correct in their assessment that the market was national and the entry of summary judgment was appropriate accordingly.

Consequently, the petition for writ of certiorari should be denied since the principle enunciated here is not at odds with other decisions of this Court. Moreover, it is dictated by the only evidence in this record on this issue.

CONCLUSION

The Petition for Writ of Certiorari should be denied since the Court of Appeals for the Seventh Circuit correctly stated the principles applicable with reference to a Sherman Act Anti-Trust claim in view of *Hyde v. Jefferson Parish Hospital* and the propriety of the grant of a Motion for Summary Judgment, and the evidence here dictated summary judgment as the evidence is "so one-sided that one party (Respondents) must prevail as a matter of law."

Respectfully submitted,

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